



THE SOUTHERN REGIONAL LIBRARY

T
C7766 d
1913



THE LIBRARY
OF
THE UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW

Cases on Damages
Cooley

Digitized by the Internet Archive
in 2008 with funding from
Microsoft Corporation

<http://www.archive.org/details/casesondamages00cool>

HORNBOOK CASE SERIES

ILLUSTRATIVE CASES ON DAMAGES

By ROGER W. COOLEY

PROFESSOR OF LAW, UNIVERSITY OF NORTH DAKOTA

AUTHOR OF "BRIEFS ON THE LAW OF INSURANCE," "ILLUSTRATIVE CASES ON PERSONS
AND DOMESTIC RELATIONS," AND "ILLUSTRATIVE CASES ON INSURANCE"

A COMPANION BOOK TO HALE ON DAMAGES (2D ED.)

ST. PAUL, MINN.
WEST PUBLISHING CO.

1913

COPYRIGHT, 1913
BY
WEST PUBLISHING COMPANY

(COOLEY DAM.)

7
C7766 d
1913

THE ILLUSTRATIVE CASEBOOK SERIES

It is the purpose of the publishers to supply a set of Illustrative Casebooks to accompany the various volumes of the Hornbook Series, to be used in connection with the Hornbooks for instruction in the classroom. The object of these Casebooks is to illustrate the principles of law as set forth and discussed in the volumes of the Hornbook Series. The text-book sets forth in a clear and concise manner the principles of the subject; the Casebook shows how these principles have been applied by the courts, and embodied in the case law. With instruction and study along these lines, the student should secure a fundamental knowledge and grasp of the subject. The cases on a particular subject are sufficiently numerous and varied to cover the main underlying principles and essentials. Unlike casebooks prepared for the "Case Method" of instruction, no attempt has been made to supply a comprehensive knowledge of the subject from the cases alone. It should be remembered that the basis of the instruction is the text-book, and that the purpose of these Casebooks is to illustrate the practical application of the principles of the law.

WEST PUBLISHING COMPANY.

(iii)*

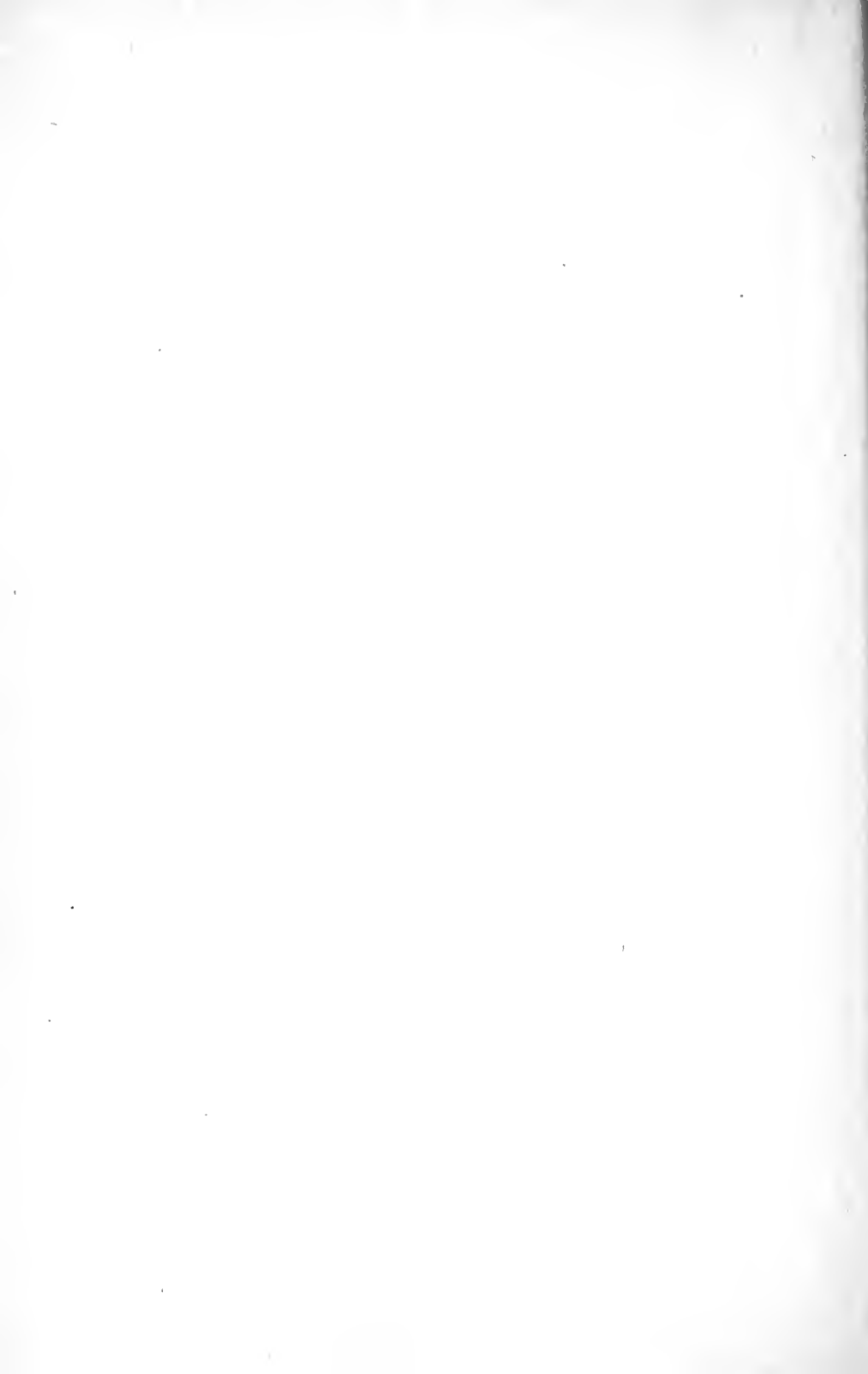


TABLE OF CONTENTS

GENERAL PRINCIPLES

	Page
I. Theory of Damages.	
1. Compensation the Rule.....	1
II. Wrong and Damage.	
1. Damnum Absque Injuria.....	3

NOMINAL DAMAGES

I. General Nature.	
1. Actual Loss not Proved.....	8
2. De Minimis Non Curat Lex.....	10
3. Nominal Damages Establish Rights.....	13
4. New Trials and Costs.....	16

COMPENSATORY DAMAGES

I. Direct Losses.	
1. In Tort	20
2. In Contract	24
II. Consequential Losses.	
1. Proximate and Remote Consequential Losses.....	27
2. Consequential Damages for Torts.....	35
3. Consequential Damages for Breach of Contract.....	39
(a) In General.....	39
(b) Damages Arising under Ordinary Circumstances.....	42
(c) Damages Arising from Circumstances not Contem- plated	48
(d) Notice of Special Circumstances.....	53
III. Avoidable Consequences.....	62
IV. The Required Certainty of Damages.....	70
V. Same—Profits or Gains Prevented.....	74
VI. Entirety of Demand.....	80
VII. Time to Which Compensation may be Recovered—Past and Future Losses	81
1. Continuing Contracts.....	81
2. Continuing Torts.....	88
3. Damages Caused by Permanent Structures.....	94
VIII. Elements of Compensation—Physical Pain and Inconvenience....	102
IX. Same—Mental Suffering.....	107
1. As the Basis of a Cause of Action.....	107
2. In Actions of Tort.....	110
3. In Actions on Contract.....	112
X. Aggravation and Mitigation of Damages.....	126
XI. Reduction of Loss.....	128
XII. Injuries to Limited Interests.....	133
1. Interests in Real Property in Possession.....	133
2. Interests of Mortgagor and Mortgagee.....	134
3. Joint Interests.....	136

BONDS, LIQUIDATED DAMAGES, AND ALTERNATIVE CONTRACTS

	Page
I. Liquidated Damages and Penalties—Rules of Construction.....	139
II. Alternative Contracts.....	149

INTEREST

I. Pecuniary Losses—Liquidated Demands.....	151
II. Pecuniary Losses—Unliquidated Demands.....	152

VALUE

I. How Estimated.....	165
II. Market Value.....	167
III. Value Peculiar to Owner.....	171
IV. Highest Intermediate Value.....	174

EXEMPLARY DAMAGES

I. When Recoverable.....	182
1. In General.....	182
2. Torts Which are also Crimes.....	189
II. Liability of Principal for Act of Agent.....	190

PLEADING AND PRACTICE

I. Allegation of Damage—The Ad Damnum.....	199
II. Allegation of Damage—Form of Statement.....	200
III. Province of Court and Jury.....	204

BREACH OF CONTRACTS FOR SALE OF GOODS

I. Action by Seller—Damages for Nonacceptance.....	210
II. Action by Buyer—Damages for Nondelivery.....	213
III. Same—Damages for Breach of Warranty.....	215

DAMAGES IN ACTIONS AGAINST CARRIERS

I. Carriers of Goods—Damages for Loss or Nondelivery.....	216
II. Same—Damages for Delay.....	218
III. Carriers of Passengers—Wrongful Ejection.....	221

DAMAGES IN ACTIONS AGAINST TELEGRAPH COMPANIES

I. Compensatory Damages—Proximate and Certain Damages.....	228
II. Same—Remote and Speculative Damages.....	230
III. Same—Damages Not Within Contemplation of Parties—Notice of Purpose and Importance of Message.....	232
IV. Same—Cipher Messages.....	237

DAMAGES FOR DEATH BY WRONGFUL ACT

I. Damages in Statutory Action—Pecuniary Loss.....	242
II. Exemplary Damages.....	247
III. No Damages for Injury to Deceased.....	251

	Page
IV. Prospective Pecuniary Losses—Prospective Benefits.....	254
V. Same—Prospective Inheritance.....	258
VI. Nominal Damages.....	263

WRONGS AFFECTING REAL PROPERTY

I. Injuries to Real Property—Trespases.....	268
II. Contracts to Sell Real Property—Breach by Vendor.....	270
III. Same—Breach by Vendee.....	272

BREACH OF MARRIAGE PROMISE

I. Compensatory Damages.....	274
II. Exemplary Damages.....	279

*



TABLE OF CASES

	Page		Page
Alabama G. S. R. Co. v. Sellers...	185	Harper Furniture Co. v. Southern	
Atchison, T. & S. F. R. Co. v.		Exp. Co.....	53
Townsend	247	Harvey v. Mason City & Ft. D. R.	
		Co.	94
Baltimore & O. R. Co. v. Carr....	204	Hauser v. Griffith.....	189
Barker v. S. A. Lewis Storage &		Hedden v. Schneblin.....	45
Transfer Co.....	171	Heister v. Loomis.....	201
Blackmer v. Cleveland, C., C. &		Henry v. Ohio River R. Co.....	98
St. L. R. Co.....	216	Herron v. Western Union Tel. Co.	228
Bowers v. Mississippi & R. R.		Hewson-Herzog Supply Co. v.	
Boom Co.....	91	Minnesota Brick Co.....	1
Brown v. Cowles.....	51	Hogan v. Kyle.....	272
		Hunt Bros. Co. v. San Lorenzo	
Calumet River R. Co. v. Moore..	165	Water Co.....	48
Chellis v. Chapman.....	279		
Chicago City R. Co. v. Saxby....	65	Illinois Cent. R. Co. v. Cobb,	
Cole v. Gray.....	184	Christy & Co.....	65
		Illinois Cent. R. Co. v. Johnson &	
Davidson Development Co. v.		Fleming	57
Southern R. Co.....	218	Ingram v. Rankin.....	179
Davis v. Bowers Granite Co.....	199		
Delaware & A. Telegraph & Tele-		Jacksonville, T. & K. W. R. Co. v.	
phone Co. v. Elvins.....	134	Peninsular Land, Transp. &	
Demarest v. Little.....	258	Mfg. Co.....	167
Denver & R. G. R. Co. v. Spencer	261	Jones v. King.....	17
Douglass v. Ohio River R. Co....	8	Judd v. Dike.....	151
Dow v. Winnepesaukee Gas &		J. Wragg & Sons Co. v. Mead....	24
Electric Co.....	38		
Durfee v. Newkirk.....	182	Kansas Pac. Ry. v. Muhlman....	88
Dwyer v. Chicago, St. P., M. & O.		Keck v. Bieber.....	147
R. Co.....	251	Kentucky Heating Co. v. Hood..	35
Elliott v. Missouri Pac. R. Co.,	133	Lake Shore & M. S. R. Co. v.	
Ellis v. Hilton.....	67	Prentice	194
		Larson v. Chase.....	107
Farrand v. Aldrich.....	126	Lawrence v. Porter.....	62
Fell v. Union Pac. R. Co.....	159	Laycock v. Parker.....	152
Florida Cent. & P. R. Co. v. Fox-		Lazelle v. Newfane.....	263
worth	242	Little Rock Ry. & Electric Co. v.	
		Dobbins	224
Gilman v. Brown.....	268	Louisville & N. R. Co. v. Stewart	173
Gilson v. Delaware & H. Canal Co.	27		
Goddard v. Grand Trunk Rty. of		McAllister v. Clement.....	12
Canada	190	McDermott v. Severe.....	110
Goodhart v. Pennsylvania R. Co.	102	McKay v. New England Dredging	
Gronan v. Kukkuck.....	127	Co.	254
		McMullan v. Dickinson Co.....	84
Hadley v. Baxendale.....	39	Mentzer v. Western Union Tel.	
Hammer v. Schoenfelder.....	47	Co.	115

	Page		Page
Merica v. Burgett.....	139	Smith v. Bergengren.....	149
Murphy v. Fond Du Lac.....	132	State v. Davis.....	9
Nashville, C. & St. L. Ry. v. Mil- ler	128	States v. Durkin.....	76
National Fibre Board Co. v. Lew- iston & A. Electric Light Co..	77	Summerfield v. Western Union Tel. Co.....	122
Neppach v. Oregon & C. R. Co..	270	Tathwell v. Cedar Rapids.....	205
O'Keefe v. Dyer.....	142	Taylor v. Spencer.....	42
Osmun v. Winters.....	274	Todd v. Gamble.....	210
		Towaliga Falls Power Co. v. Sims	30
		Turner v. Great Northern R. Co.	105
Park v. Richardson-Boynton Fur- nace Co.....	215	Waggoner v. Snody.....	136
Patterson v. Illinois Cent. R. Co.	60	Wartman v. Swindell.....	10
Pennsylvania Coal Co. v. Sander- son	4	Watson v. Rheinderknecht.....	22
Potter v. Mellen.....	16	Webb v. Portland Mfg. Co.....	13
Primrose v. Western Union Tel. Co.	237	West Chicago St. R. Co. v. Levy..	200
Prince v. State Mut. Life Ins. Co.	187	Western Real Estate Trustees v. Hughes	69
Randall v. Hazelton.....	3	Western Union Tel. Co. v. Milton	232
Richmond & D. R. Co. v. Allison	70	Western Union Tel. Co. v. Twad- dell	230
Righter v. Clark.....	213	Wichita & W. R. Co. v. Beebe....	80
Roehm v. Horst.....	81	Wood v. Pennsylvania R. Co....	32
Schumaker v. St. Paul & D. R. Co.	20	Wragg & Sons Co. v. Mead.....	24
Sherman Center Town Co. v. Leonard	74	Wright v. Bank of Metropolis....	174
		Wright v. Beardsley.....	112
		Yorton v. Milwaukee, L. S. & W. R. Co.....	221

ILLUSTRATIVE CASES ON DAMAGES

GENERAL PRINCIPLES

I. Theory of Damages.¹

1. COMPENSATION THE RULE

HEWSON-HERZOG SUPPLY CO. v. MINNESOTA BRICK CO.

(Supreme Court of Minnesota, 1893. 55 Minn. 530, 57 N. W. 129.)

Action by the Hewson-Herzog Supply Company against the Minnesota Brick Company to recover damages for breach of contract. On the trial the court below directed the jury to find a verdict for the plaintiff for \$26,415. Subsequently, on defendant's motion, the court granted a new trial on the ground that the evidence as to damages was insufficient. From this order the plaintiff appeals.

BUCK, J.² * * * The contract provides that the defendant shall manufacture and sell to the plaintiff, during the season of 1890, all the pressed brick to be made by the defendant at its yards at Wheeler, Dunn county, Wis., and to burn, and have ready for shipment during the season commencing on or before June 9, 1890, good merchantable pressed brick, * * * to the number of not less than 3,000,000, and as many more as defendant could make, up to the number of 6,000,000. * * * The plaintiff was to * * * pay defendant \$13.50 per thousand for such brick on board cars at defendant's yards at Wheeler, Wis., upon the basis of \$2.50 per thousand for freight to St. Paul or Minneapolis, and, if the freight was greater than this amount, the difference should be deducted from the \$13.50 per thousand for the brick. * * * The defendant made various attempts to manufacture the brick mentioned in the contract, but did not succeed, and it was unable to furnish the plaintiff with the amount of brick re-

¹ For a discussion of principles, see Hale on Damages (2d Ed.) § 2.

² Part of the opinion is omitted and the statement of facts is rewritten.

quired by the terms of the contract, only a few thousand being furnished. By reason of this failure, the plaintiff alleged that it was damaged in the sum of \$27,000. * * *

On the trial the plaintiff was permitted to show by two witnesses, against the objections of defendant, that the market value of the pressed brick of the character described in the contract was \$28 per thousand at Minneapolis, but on cross-examination they testified that this price or market value was that which the jobber or agent charged to the builder, and not the price or value of such brick when sold by the manufacturer to a jobber or agent, and that as to such prices or values they had no knowledge. Upon this subject no other testimony was given by plaintiff, although its principal managing officers were examined as witnesses upon the trial. A witness for the defendant testified that there was a difference in the market price or value of brick sold by the manufacturer to the jobber or agent, and the price or market value of brick sold by the jobber or agent to the builder or contractor, which evidence was not disputed. The court below held the measure of damages to be the difference between the contract price of the brick delivered in St. Paul or Minneapolis, viz. \$16 per thousand, and the price which the jobber or middleman charged or sold the brick to the builder or contractor viz. \$28 per thousand, but limited the amount of the recovery to \$9 per thousand, because the plaintiff only demanded that amount in its pleadings. In cases of this kind, no more damages can be recovered than such as were within the contemplation of the parties when the contract was entered into, and which would likely result from a breach thereof; for the familiar rule may be applied here "that the intention of the parties is to be ascertained from the whole contract, considered in connection with the surrounding circumstances known to both parties."

It cannot be reasonably or legally claimed that these parties ever contemplated that, if the defendant was unable to perform the conditions of its contract, the measure of damages should be the difference between the price of the brick to the plaintiff at St. Paul or Minneapolis, viz. \$16 per thousand, and the price which the plaintiff, as jobber, charged or sold the brick for to the builder or contractor. Such a rule or measure of damages would compel the defendant to pay the plaintiff all the expense of carrying on its business, including the value of time spent, costs of handling, and other incidental expenses attending the sale of 3,000,000 brick at retail, for a period of nine months at least, the time covered by the contract. The result would also be that the plaintiff would receive a greater sum as damages by reason of the defendant's default than it could obtain as profits if the defendant had performed all the conditions of its contract with plaintiff. This is not the compensation as damages which the law permits by reason of the breach of a contract. The rule stated as law in *Sutherland* on

Damages (volume 1, p. 17) is this: "This universal and cardinal principle is that the person injured shall receive a compensation commensurate with his loss or injury, and no more; and it is a right of the person who is bound to pay this compensation not to be compelled to pay more, except costs."

Plaintiff was not entitled to recover, as damages, any greater sum than the difference between the contract price of the brick at St. Paul and Minneapolis, viz. \$16 per thousand, in the quantities and at the periods mentioned in the contract, and the market value at those places which it would have to pay as jobbers or middlemen for brick of a similar kind, and in the quantities which it was entitled to receive under its contract (*Tower Co. v. Phillips*, 23 Wall. 471, 23 L. Ed. 71). * * * The order granting a new trial is affirmed.

II. Wrong and Damage³

1. DAMNUM ABSQUE INJURIA

RANDALL v. HAZELTON et al.

(Supreme Judicial Court of Massachusetts, 1866. 12 Allen, 412.)

The declaration alleged, in substance, that the plaintiff owned an estate subject to a mortgage given by a former owner, containing a power of sale for nonpayment of interest; that the mortgagees informed plaintiff that they did not want the money paid when due, and he therefore made no provision to raise the money, but that the defendants secured an assignment of the mortgage by means of false representations as to plaintiff's desires, and proceeded to make a sale under the power granted in the mortgage; that plaintiff did not know of the sale until after it occurred, and was put to great expense in obtaining a deed of the estate and in regaining title.

COLT, J.⁴ * * * The question raised by the demurrer is whether, upon the facts charged, the action can be maintained. It is an ancient and well established legal principle that fraud without damage or damage without fraud gives no cause of action; yet when the two do concur, there an action lieth. *Baily v. Merrell*, 3 Bulst. 95. Actions like the one under consideration are all based upon this proposition; but it cannot safely be applied as a test by which to determine whether the facts in any case constitute an

³ For a discussion of principles, see *Hale on Damages* (2d Ed.) § 3.

⁴ Part of the opinion is omitted and the statement of facts is rewritten.

actionable wrong, without keeping in mind the meaning which the law, by a series of judicial decisions, has attached to the terms used. It is well settled that every falsehood is not necessarily a legal fraud or false representation. It is said that a false representation is an affirmation of that which the party knows to be false or does not know to be true, to another's loss or his own gain. *Lobdell v. Baker*, 1 Metc. 201, 35 Am. Dec. 358. So in reference to the term damage, the law is that it must be a loss brought upon the party complaining by a violation of some legal right, or it will be considered as merely *damnum absque injuria*. There is a large class of moral rights and duties, sometimes called imperfect rights and obligations, which the law does not attempt to enforce or protect. The refusal or discontinuance of a favor gives no cause of action. If one trusts to a mere gratuitous promise of favor from another and is disappointed, the law will not protect him from the consequence of his undue confidence, nor encourage carelessness or want of prudence in affairs. Damages can never be recovered where they result from a lawful act of the defendant. The exercise of a right conferred by a valid contract, in the manner provided by its terms, cannot be the ground of an action. The law will not inquire into the motives of the party exercising such right, however unfriendly and selfish. The trouble and expense and risk of loss ought to and must be presumed to have been contemplated when the contract was entered into. The foreclosure of a mortgage under a power of sale, for example, may be made at such time and under such circumstances as to cause great distress and sacrifice to the mortgagor; but, whatever the motive of the mortgagee, no remedy is afforded for his oppressive conduct, if the requirements of the contract have been fulfilled. * * * Demurrer sustained.

PENNSYLVANIA COAL CO. v. SANDERSON.

(Supreme Court of Pennsylvania, 1886. 113 Pa. 126, 6 Atl. 453, 57 Am. Rep. 445.)

Trespass on the case by J. Gardner Sanderson and Eliza, his wife, in the right of the wife, against the Pennsylvania Coal Company, for damages for the corruption of plaintiff's water-course caused by the working of defendant's colliery. The defendant as the owner of coal lands situated on a tributary of the Lackawanna river known as Meadow brook opened mines in 1867 or 1868. From the time the first tunnel was driven the mine water flowed by natural course into Meadow brook. The water which percolated into the mine was pumped therefrom and flowed also into Meadow brook, which was the natural water-course for drainage of the basin in which the mines were situated. The plaintiff, Mrs. Sanderson,

in 1868, purchased a tract of land on Meadow brook, about three miles below defendant's mines; the existence of the stream, the purity of its water, and its utility for domestic and other purposes being the inducement to the purchase. In 1870 she erected a house on the land, and in connection therewith built dams across the brook to form fish and ice ponds and to supply a cistern.

It was alleged that the large volume of mine water which the defendant poured into Meadow brook corrupted the water of the stream so as to render it unfit for domestic use, that the fish have been destroyed, plaintiff's pipes corroded, and the whole apparatus installed to utilize the water rendered worthless, in consequence of which the same was abandoned. There was a verdict and judgment for plaintiff for \$2,872, and defendant brings error.

CLARK, J.⁵ * * * It has been stated that 30,000,000 of tons of anthracite and 70,000,000 of bituminous coal are annually produced in Pennsylvania. It is therefore a question of vast importance, and cannot, on that account, be too carefully considered: for, if damages may from time to time be recovered, either in the present form or as for a nuisance, punitive sums may be resorted to to prevent repetition, or to compel the abatement of the nuisance. Indeed, if the right to damages in such cases is admitted, equity may, and under the decisions of this court undoubtedly would, at the suit of any riparian owner, take jurisdiction, and, upon the ground of a continuous and irreparable injury, enjoin the operation of the mine altogether. Whatever rights Mrs. Sanderson may have to the use of this water, and whatever remedy she may have in this case, or in any other form, in law or in equity, is the right and remedy of every other riparian owner along Meadow brook: and whatever may be the rights and remedies of the owners on Meadow brook are, of course, the rights and remedies of all other riparian owners throughout the commonwealth. It may be that Mrs. Sanderson adopted a more extensive arrangement for the use of this water than any other person, and is consequently more inconvenienced on that account; but the law is the same in her case as in all other cases. If she may recover damages in a large amount, others similarly but less affected may recover in a less sum. Besides, these riparian owners are not limited to their present modes of enjoyment. It is impossible to foresee what other modes of enjoyment they or their successors in title may adopt, or to estimate the extent of damages to which the continued pollution of the stream might proceed. Hence, if the responsibility of the operator of a mine is extended to injuries of the character complained of, the consequences must be that mining cannot be conducted except by the general consent of all parties affected.

It will be observed that the defendants have done nothing to change the character of the water, or to diminish its purity, save

⁵ Part of the opinion is omitted and the statement of facts is rewritten.

what results from the natural use and enjoyment of their own property. They have brought nothing onto the land artificially. The water as it is poured into Meadow brook is the water which the mine naturally discharged. Its impurity arises from natural, not artificial, causes. The mine cannot, of course, be operated elsewhere than where the coal is naturally found, and the discharge is a necessary incident to the mining of it.

It must be conceded, we think, that every man is entitled to the ordinary and natural use and enjoyment of his property. He may cut down the forest trees, clear and cultivate his land, although in so doing he may dry up the sources of his neighbor's springs, or remove the natural barriers against wind and storm. If, in the excavation of his land, he should uncover a spring of water, salt or fresh, acidulated or sweet, he will certainly not be obliged to cover it again, or to conduct it out of its course, lest the stream in its natural flow may reach his neighbor's land. It has always been considered that land on a lower level owes a natural servitude to that on a higher level, in respect of receiving, without claim for compensation by the owner, the water naturally flowing down to it. In sinking his well, he may intercept and appropriate the water which supplies his neighbor's well (*Acton v. Blundell*, 12 Mees. & W. 324; *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721; *Halderman v. Bruckhart*, 45 Pa. 514, 84 Am. Dec. 511), or, if his own well is so close to the soil of his neighbor as to require the support of a rib of clay or of stone on his neighbor's land to retain the water in the well, no action will lie against the owner of the adjacent land for digging away such clay or stone which is his own property, and thereby letting out the water (*Whart. Neg.* 939). He may, to a reasonable extent, *jure naturæ*, divert water from a stream for domestic purposes, and for the irrigation of his land. *Messinger's Appeal*, 109 Pa. 285, 4 Atl. 162. So, also, each of two owners of adjoining mines has a natural right to work his own mine in the manner most convenient and beneficial to himself, although the natural consequence may be that some prejudice will occur to the owner of the adjoining mine. *Smith v. Kenrick*, 7 C. B. 505. One mine-owner may thus permit water naturally flowing in his own mine to pass off by gravitation into an adjoining or lower mine so long as his operations are carried on properly and in the usual manner. *Bainb. Mines*, 297. To the same effect are *Wilson v. Waddell*, L. R. 2 App. Cas. 95; *Crompton v. Lea*, L. R. 19 Eq. 115.

The defendants, being the owners of the land, had a right to mine the coal. It may be stated, as a general proposition, that every man has the right to the natural use and enjoyment of his own property; and if, while lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*; for the rightful use of one's own land may cause damage to another, without any legal

wrong. Mining in the ordinary and usual form is the natural user of coal lands. They are, for the most part, unfit for any other use. "It is established," says Cotton, L. J., in *West Cumberland Iron Co. v. Kenyon*, L. R. 6 Ch. Div. 773, "that taking out minerals is a natural use of mining property, and that no adjoining proprietor can complain of the result of careful, proper mining operations." In the same case, Brett, L. J., says: "The cases have decided that, where that maxim [*sic utere tuo ut alienum non lædas*] is applied to landed property, it is subject to a certain modification; it being necessary for the plaintiff to show, not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural use of his own land."

The right to mine coal is not a nuisance in itself. It is, as we have said, a right incident to the ownership of coal property; and when exercised in the ordinary manner, and with due care, the owner cannot be held for permitting the natural flow of mine water over his own land, into the water-course, by means of which the natural drainage of the country is effected. There are, it is well known, percolations of mine water into all mines. Whether the mine be operated by tunnel, slope, or shaft, water will accumulate, and unless it can be discharged, mining must cease. The discharge of this acidulated water is practically a condition upon which the ordinary use and enjoyment of coal lands depends. The discharge of the water is practically part and parcel of the process of mining; and, as it can only be effected through natural channels, the denial of this right must inevitably produce results of a most serious character to this, the leading industrial interest of the state. The defendants were engaged in a perfectly lawful business, in which they had made large expenditures, and in which the interests of the entire community were concerned. They were at liberty to carry on that business in the ordinary way, and were not, while so doing, accountable for consequences which they could not control. As the mining operations went on, the water, by the mere force of gravity, ran out of the drifts, and found its way over the defendant's own land to the Meadow brook. It is clear that for the consequences of this flow, which, by the mere force of gravity, naturally, and without any fault of the defendants, carried the water into the brook, and thence to the plaintiff's pond, there could be no responsibility as damages on part of the defendants. * * * The judgment is reversed.

NOMINAL DAMAGES

I. General Nature¹

1. ACTUAL LOSS NOT PROVED

DOUGLASS v. OHIO RIVER R. CO.

(Supreme Court of Appeals of West Virginia, 1902. 51 W. Va. 523, 41 S. E. 911.)

Action by Hiram Douglass against the Ohio River Railroad Company to recover damages for the breach of covenant to construct and maintain cattle guards and crossings. There was judgment for plaintiff, and defendant brings error. Reversed.

BRANNON, J.² * * * We think that the plaintiff showed only a right to nominal damages, not compensatory damages, because he showed no actual loss from the omission to build and maintain fences and crossings—no loss computable in law. The fencing and crossing were only for use if the land was used for grazing. It had no grass upon it. The plaintiff neither put cattle upon it, nor appears to have had any cattle to put upon it. He used it every year for grain. He had no fencing on two sides of the field. It very plainly appeared that he really did not desire to use the land for grazing. Why does it so appear? Because, though the company did build fences three years before this suit began—good fences, as the plaintiff admits—he did not put a hoof of stock upon the land, but kept on cropping it. His whole action shows that, as the land was first-class Ohio river bottom land, he preferred to use it for grain. As he had no cattle there, how did he suffer any loss, and where is the justice of paying him damages when he showed no loss? If he had had cattle there, they could have got water from Mill creek and a drain on the land. He drained and tiled the land for agricultural purposes. The company, it is true, did not comply with the letter of its bond, and is liable to nominal damages. Such failure of duty will not alone give right to compensatory damages. There must be both a broken duty, and an actual loss therefrom—a computable loss, a measurable loss, not one merely conjectural, or that can be guessed at. “If the company fails to perform an agreement to fence, and animals are killed by reason thereof, the measure of damages is not what it would cost to erect the fence, but the value of the animals killed

¹ For a discussion of principles, see Hale on Damages (2d Ed.) §§ 15-17.

² Part of the opinion is omitted and the statement of facts is rewritten.

or injured, or other damage done; or, in other words, the company will be liable for all damages which proximately flow from its failure to perform its contract duty." 3 Elliott, R. R. § 1188. There must be actual damage done, to warrant compensatory damages. 12 Am. & Eng. Enc. Law, 1073. * * *

Douglass claimed that he did not put cattle on the land from fear that they would be killed by trains. Loss from that cause would be purely conjectural. Such loss, though possible, cannot be considered where we have to assess damages as actual—based on actual loss. The cattle might not have been hurt. If hurt, when hurt the company would have to pay their value. Shall we make it pay for cattle not hurt, not even on the premises? Again, the evidence discloses no certain criterion for assessment of damage. A jury must have definite evidence by which to find a certain sum as compensation for actual loss, before it can render a verdict for compensatory damages. For a broken contract, merely, it can find nominal damages, but not compensatory; for the very term "compensatory damages" implies that there must be actual loss before compensation can be given, and there must be definite basis given by the evidence upon which a jury can define and fix the amount of the loss; otherwise any assessment is without law and against law. If the plaintiff cannot show such a basis, it is his misfortune; his evidence fails to show a loss of such substantial, tangible cast as that we can take hold of it, and weigh and fix it in dollars. A jury is never permitted to grope in the dark, and merely surmise, approximate, or guess at damages. *Watts v. Railroad Co.*, 39 W. Va. 196, 19 S. E. 521, 23 L. R. A. 674, 45 Am. St. Rep. 894; *Guinn v. Railroad Co.*, 46 W. Va. 151, 33 S. E. 87, 76 Am. St. Rep. 806. Had any stock been killed for want of fences, or perished for want of a crossing, or if the plaintiff had shown any special actual loss, he could recover; but, as it is, where is his real loss? As there were no fences, we do not see that the want of a crossing could be a basis of damages, even if there had been cattle on the land. Therefore we are compelled to say that the evidence is not of that character to justify the verdict. It is against law, touching the measurement of damages. * * *

STATE ex rel. LOWERY v. DAVIS et al.

(Supreme Court of Indiana, 1889. 117 Ind. 307, 20 N. E. 159.)

Lowery brought this action to recover upon the official bond of Davis, recorder of deeds of Madison county. The breach alleged was that Davis, in recording a deed from Lowery to another, had negligently entered a stipulation in that deed that the grantee should assume and pay a certain mortgage previously made by

Lowery, to the extent of \$500, as a stipulation to assume and pay it only to the extent of \$200; and, the land having been sold again to one who was ignorant of the true amount, Lowery had lost his right to have the land charged with full amount. It was alleged also that the first grantee was insolvent, and that the plaintiff had been compelled to pay the \$500. Upon the trial, however, there was no proof that the amount could not be collected from the grantee who had assumed it.

ELLIOTT, C. J.³ * * * The jury returned a verdict in favor of the relator for \$1, and his counsel insist that this finding decides all questions in his favor, and that, consequently, the assessment of the amount of recovery should have been at least \$300. We cannot accept this theory. The recorder, who is guilty of a breach of duty, is only liable for nominal damages, unless the plaintiff proves an actual loss. It is quite clear, therefore, that a verdict for nominal damages does not necessarily decide all material questions in favor of the plaintiff, for, on the contrary, it really decides that he suffered nothing more than a nominal injury. A plaintiff cannot recover of a recorder and the sureties on his official bond more than nominal damages, unless he proves an actual loss, and to prove this he must show, in such a case as this, that he could not have collected the amount of his lien from the party who assumed to pay it. In other words, where a recorder negligently so records a deed reserving a lien as to make the amount of the lien \$200, when it should be \$500, he is not liable beyond nominal damages, unless the plaintiff proves that he cannot collect the full amount of the lien from the person who assumed its payment. If the person who undertook to pay remains liable and solvent, then the money must be collected from him, and not from the recorder and his sureties.⁴ * * *

2. DE MINIMIS NON CURAT LEX

WARTMAN v. SWINDELL.

(Court of Errors and Appeals of New Jersey, 1892. 54 N. J. Law, 589, 25 Atl. 356, 18 L. R. A. 44.)

VAN SYCKEL, J. In September, 1891, the clerk of the plaintiff in error, who was plaintiff below, drove the horse and carriage of the plaintiff to the sheriff's office in Camden, and there tied the horse to a post at the curb line of the street. While the clerk was

³ Part of the opinion is omitted.

⁴ See, also, *McAllister v. Clement*, post, p. 12.

in the sheriff's office, the lines, worth about three dollars or four dollars, were taken from the horse by the defendant in error, and the clerk was left without the means of driving the horse. He thereupon demanded the lines of the defendant, who refused to return them to him. The clerk then went to the office of the plaintiff, and informed him of the occurrence, and was instructed to return to the courthouse, and again demand the lines of the defendant. A second demand was made, and the defendant refused to comply with it. Thereupon the plaintiff brought suit against the defendant for damages. On the trial of the cause in the court below the plaintiff, after proving the facts above stated, rested his case. On the cross-examination of the plaintiff's clerk it appeared that the defendant said to him that the plaintiff had taken a small article from the defendant, and the clerk, in reply to the question whether the defendant did not take the lines by way of a joke, said he "supposed perhaps he did it in a joke, but he did not know what it was done for when it was first done." When the plaintiff had rested his case, the trial judge said: "If the defendant will make a tender of these lines now, I will dismiss this case upon the ground *de minimis non curat lex*." The defendant thereupon tendered the lines to the plaintiff, and the court dismissed the jury from the further consideration of it. This disposition of the case is the error complained of in this court.

The trial judge acted upon the idea that the conduct of the defendant was intended as a joke, and that the matter involved was too insignificant to claim the attention of the court. If the defendant relied upon the fact that he removed the lines by way of a joke, it was a question for the jury to decide whether the parties had been perpetrating practical jokes upon each other in such a way that the defendant had a right to believe that the plaintiff would accept this act as a joke. That question could not legally be taken from the jury, and settled by the court; nor, in my judgment, was the maxim *de minimis non curat lex* applicable to this case. In *Seneca Road Co v. Auburn & R. R. Co.*, 5 Hill (N. Y.) 175, Mr. Justice Cowen said this maxim is never applied to the positive and wrongful invasion of another's property. The right to maintain an action for the value of property, however small, of which the owner is wrongfully deprived, is never denied. A trespass upon lands is actionable, although the damage to the owner is inappreciable. The celebrated *Six Carpenters' Case*, reported in 8 Coke, 432, involved a trifling sum. But as the case in hand stood at the close of the plaintiff's testimony, I am not prepared to say that a verdict for substantial damages would not have been justifiable.

In my opinion, the trial court erred in dismissing this case, and the judgment below should therefore be reversed.⁵

⁵ See, also, *Potter v. Mellen*, post, p. 16.

McALLISTER v. CLEMENT et al.

(Supreme Court of California, 1888. 75 Cal. 182, 16 Pac. 775.)

BELCHER, C. C. This action was brought to recover damages for the alleged official misconduct or neglect of a notary public. The material facts of the case are as follows: In 1883, the defendant, C. H. Clement, was a notary public for San Luis Obispo county, and the other defendants were the sureties on his official bond. On the 14th day of April of that year, one W. A. Cook made to the plaintiff his promissory note for \$600, payable six months after date, with interest; and on the same day, to secure the payment of the note, executed to plaintiff a mortgage upon a crop of wheat, barley, and oats then growing in the county of San Luis Obispo. The mortgage was properly sworn to by the mortgagor and mortgagee, and was acknowledged by the mortgagor before the defendant Clement. The certificate of acknowledgment, which was attached to the mortgage, reads as follows:

"State of California, County of San Luis Obispo—ss.: On this 14th day of April, 1880, before me personally appeared W. A. Cook, known to me to be the person whose name is subscribed to the within instrument, and he acknowledged to me that he executed the same. In witness whereof I have hereunto set my hand, and affixed my official seal, at my office in the county of San Luis Obispo, on the day and year in this certificate first above written.

"[Seal.] C. H. Clement, Notary Public."

In this condition the mortgage was recorded on the 19th day of May, 1883.

Before the note became due, Cook was adjudged to be an insolvent debtor, and his assignee in insolvency took possession of all his property, including the mortgaged crop. The plaintiff made no effort to foreclose his mortgage, or to subject the mortgaged property to the payment of his debt. The note has never been paid, and Cook is insolvent and unable to pay it. It is alleged in the complaint that the failure to state correctly in the certificate the year when the acknowledgment was taken, and to insert in the body of the certificate "the name and quality of the officer" who made it, destroyed the lien of the mortgage as against the assignee, and left the mortgaged crop free and clear of all claim thereto by the plaintiff. It is further alleged that but for these defects in the certificate the mortgage "would have been a good and valid lien upon a valuable growing crop, and would have amply secured the said promissory note." The court below found the facts to be substantially as above stated, but further found "that said mortgage would not have secured said note; that said crop was not valuable, and was and is wholly valueless;" and, as a conclusion of law, "that plaintiff has not suffered any damage or loss by reason of

the act or acts of defendants, or any of them." Judgment was entered in favor of the defendants, and from that judgment the plaintiff appealed; the case coming here on the judgment roll.

We do not think it necessary to consider the question principally discussed by counsel, namely, as to the sufficiency of the certificate of acknowledgment. The Code declares that, "for the official misconduct or neglect of a notary public, he and the sureties on his official bond are liable to the parties injured thereby for all the damages sustained." Pol. Code, § 801. But it is clear that no action will lie to recover damages if no damages have been sustained. The findings are responsive to the issues, and must be presumed to have been justified by the evidence. It is urged, however, that the plaintiff was at least entitled to recover nominal damages. But why should he have nominal damages if he suffered no actual damage? The Code does not seem to justify this contention, and, at any rate, we think it is a case where in this court the maxim *de minimis non curat lex* should be applied. The judgment should be affirmed.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

3. NOMINAL DAMAGES ESTABLISH RIGHTS

WEBB v. PORTLAND MFG. CO.

(Circuit Court of the United States, 1838. 3 Sumn. 189, Fed. Cas. No. 17,322.)

Bill in equity by Joshua Webb against the Portland Manufacturing Company to restrain the diversion of water from plaintiff's mill. On the stream on which the mill was situated were two dams, the distance between which was about 40 or 50 rods, occupied by the mill-pond of the lower dam. Plaintiff owned certain mills and mill privileges on the lower dam. Defendants also owned certain other mills and mill privileges on the same dam. To supply water to one of such mills, defendants made a canal from the pond at a point immediately below the upper dam. The water thus withdrawn by them for that purpose was about one-fourth of the water to which defendants were entitled as mill-owners on the lower dam, and was returned into the stream immediately below that dam.

STORY, J.⁶ * * * I can very well understand that no action lies in a case where there is *damnum absque injuria*; that is, where there is a damage done without any wrong or violation of any right

⁶ Part of the opinion is omitted.

of the plaintiff. But I am not able to understand how it can correctly be said, in a legal sense, that an action will not lie, even in case of a wrong or violation of a right, unless it is followed by some perceptible damage, which can be established as a matter of fact; in other words, that *injuria sine damno* is not actionable. See *Mayor of Lynn, etc., v. Mayor of London*, 4 Term R. 130, 141, 143, 144; Com. Dig. "Action on the Case," B 1, 2. On the contrary, from my earliest reading, I have considered it laid up among the very elements of the common law that wherever there is a wrong there is a remedy to redress it; and that every injury imports damage in the nature of it; and, if no other damage is established, the party injured is entitled to a verdict for nominal damages. A fortiori, this doctrine applies where there is not only a violation of a right of the plaintiff, but the act of the defendant, if continued, may become the foundation, by lapse of time, of an adverse right in the defendant; for then it assumes the character, not merely of a violation of a right tending to diminish its value, but goes to the absolute destruction and extinguishment of it. Under such circumstances, unless the party injured can protect his right from such a violation by an action, it is plain that it may be lost or destroyed, without any possible remedial redress. In my judgment, the common law countenances no such inconsistency, not to call it by a stronger name. Actual, perceptible damage is not indispensable as the foundation of an action. The law tolerates no further inquiry than whether there has been the violation of a right. If so, the party injured is entitled to maintain his action for nominal damages in vindication of his right, if no other damages are fit and proper to remunerate him.

[The court then cites and discusses the case of *Ashby v. White*, 2 Ld. Raym. 938.]

The principles laid down by Lord Holt are so strongly commended, not only by authority, but by the common sense and common justice of mankind, that they seem absolutely, in a judicial view, incontrovertible. And they have been fully recognized in many other cases. In the case of *Ashby v. White*, as reported by Lord Raymond (2 Ld. Raym. 953), Lord Holt said: "If the plaintiff has a right, he must of necessity have means to vindicate and maintain it, and a remedy, if he is injured in the exercise or enjoyment of it; and, indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal." S. P. 6 Mod. 53.

The note of Mr. Sergeant Williams to *Mellor v. Spateman*, 1 Saund. 346a, note 2; *Wells v. Watling*, 2 W. Bl. 1233; and the case of the *Tunbridge Dippers*, *Weller v. Baker*, 2 Wils. 414—are direct to the purpose. I am aware that some of the old cases inculcate a different doctrine, and perhaps are not reconcilable with that of Lord Holt. There are also some modern cases which at first view

seem to the contrary. But they are distinguishable from that now in judgment; and, if they were not, *ego assentior scævole*.

On the other hand, *Marzetti v. Williams*, 1 Barn. & Adol. 415, goes the whole length of Lord Holt's doctrine: for there the plaintiff recovered, notwithstanding no actual damage was proved at the trial; and Mr. Justice Taunton on that occasion cited many authorities to show that where a wrong is done, by which the right of the party may be injured, it is a good cause of action, although no actual damage be sustained. In *Hobson v. Todd*, 4 Term R. 71, 73, the court decided the case upon the very distinction, which is most material to the present case, that if a commoner might not maintain an action for an injury, however small, to his right, a mere wrong-doer might, by repeated torts, in the course of time establish evidence of a right of common. The same principle was afterwards recognized by Mr. Justice Grose, in *Pindar v. Wadsworth*, 2 East, 162. But the case of *Bower v. Hill*, 1 Bing. N. C. 549, fully sustains the doctrine for which I contend; and, indeed, a stronger case of its application cannot well be imagined. There the court held that a permanent obstruction to a navigable drain of the plaintiff's, though choked up with mud for 16 years, was actionable, although the plaintiff received no immediate damage thereby; for, if acquiesced in for 20 years, it would become evidence of a renunciation and abandonment of the right of way. * * *

Upon the whole, without going further into an examination of the authorities on this subject, my judgment is that, whenever there is a clear violation of a right, it is not necessary in an action of this sort to show actual damage; that every violation imports damage; and, if no other be proved, the plaintiff is entitled to a verdict for nominal damages; and a fortiori that this doctrine applies whenever the act done is of such a nature as that by its repetition or continuance it may become the foundation or evidence of an adverse right. See, also, *Mason v. Hill*, 3 Barn. & Adol. 304, 5 Barn. & Adol. 1. But if the doctrine were otherwise, and no action were maintainable at law, without proof of actual damage, that would furnish no ground why a court of equity should not interfere, and protect such a right from violation and invasion: for, in a great variety of cases, the very ground of the interposition of a court of equity is that the injury done is irremediable at law, and that the right can only be permanently preserved or perpetuated by the powers of a court of equity.⁷

⁷ That nominal damages may be awarded when a right is invaded, see, also, *Larson v. Chase*, post, p. 107, and *Murphy v. City of Fond du Lac*, post, p. 132.

4. NEW TRIALS AND COSTS

POTTER v. MELLEN.

(Supreme Court of Minnesota, 1886. 36 Minn. 122, 30 N. W. 438.)

VANDEBURGH, J. Action for deceit in the sale of a laundry, including the fixtures and good-will of the business. The evidence tended to show that the defendants falsely represented to the plaintiff that the weekly receipts of the business were largely in excess of what they actually were, and that the plaintiff was thereby induced to become the purchaser. This, if true, was sufficient to make out a case of actionable fraud, and for the recovery of such damages as plaintiff might be shown to have suffered. *Pilmore v. Hood*, 5 Bing. N. C. 97; *Sedg. Dam.* *91. The action was, however, dismissed by the court for insufficiency of the proof of damages. The price paid was *prima facie* evidence of the value of the property and business, as it was represented, but there is no direct evidence of the extent of the damages; that is to say, how much less the business was worth than it was represented. Yet there was some evidence of damage to go to the jury. Plaintiff must necessarily have been put to trouble and expense; and, according to the evidence in his behalf, he had been led to believe that the receipts exceeded the expenses by \$20 or more per week, and that the business was a profitable one. In this he was disappointed, and he lost his time and labor in attempting to carry it on, though the evidence also tended to show that the business and receipts increased under his management, with substantially the same expenditures as before; and, conceding that he was strictly entitled to nominal damages only, he would nevertheless be entitled to his costs. *Greenman v. Smith*, 20 Minn. 418 (*Gil.* 370).

This action is not trivial or vexatious, nor does it belong to the class commonly called "hard actions." By taking the case from the jury, the substantial rights of the plaintiff were violated, and for this error there should be a new trial. *Smith v. Sutts*, 2 Johns. (N. Y.) 9; *Eaton v. Lyman*, 30 Wis. 46; *Allaire v. Whitney*, 1 Hill (N. Y.) 484; *Sedg. Dam.* *51; 1 *Suth. Dam.* 13, 815. Order reversed.

JONES v. KING.

(Supreme Court of Wisconsin, 1873. 33 Wis. 422.)

LYON, J.⁸ This is an action for slander. The complaint charges the speaking by the defendant, to and concerning the plaintiff, of certain slanderous words, imputing to the latter the committing of divers criminal offenses. The defendant, by his answer, denies the speaking of some of the slanderous words set out in the complaint, and admits the speaking of others of them, and alleges, by way of mitigation, that the plaintiff provoked him, by charging him with crime, and by applying to him grossly insulting epithets, to utter the language complained of. The evidence shows that the parties casually met, and engaged in a conversation, which at first was reasonably good-natured, but soon became an angry verbal altercation, in which vile epithets and charges of crime were freely hurled by each at the other. * * * The jury returned a verdict for the defendant, upon which, after a motion for a new trial had been overruled, judgment was rendered dismissing the complaint, with costs.

The plaintiff appeals, and his counsel claims that there should have been a verdict for nominal damages, at least, which, while it would have only carried nominal costs for the plaintiff, would have defeated the defendant's rights to recover costs. The claim of the learned counsel is doubtless correct. The speaking of words by the defendant, to and concerning the plaintiff, imputing to him a criminal offense, as charged in the complaint, is admitted by the answer. The plaintiff was therefore entitled to a verdict for at least nominal damages, without introducing any testimony, and without regard to the testimony which was introduced on the trial; and such verdict would have defeated the recovery of costs by the defendant. * * *

In *Laubenheimer v. Mann*, 19 Wis. 519, it was held that a judgment of nonsuit, although erroneous, will not be reversed, if it appear that the plaintiff is only entitled to nominal damages, if the case be one in which the defendant would recover costs, notwithstanding there is a judgment for nominal damages rendered against him. That was an action for a penalty, and was within the jurisdiction of a justice of the peace. Hence, had the plaintiff recovered nominal damages, the defendant would have been entitled to costs, the same as upon a nonsuit. In *Mecklem v. Blake*, 22 Wis. 495, 99 Am. Dec. 68, which was an action to recover damages for alleged breaches of the covenants of seisin and against incumbrances in a deed of land, the court followed the decision in *Laubenheimer v. Mann*, and refused to reverse a judgment dismissing the com-

⁸ Part of the opinion is omitted.

plaint, although it appeared that the plaintiff was entitled to recover, but only to recover nominal damages. The fact was entirely overlooked that such damages, in that action, would have entitled the plaintiff to costs. Hence, in *Eaton v. Lyman*, 30 Wis. 42 (which was also an action on the covenants contained in a conveyance of real estate), *Mecklem v. Blake* was overruled as to the point we are considering; and, it appearing that the plaintiff was entitled to nominal damages, we reversed a judgment of nonsuit against them.

We are entirely satisfied with this decision, and believe that it establishes the correct rule in all actions sounding in contract to which it is applicable. But there is a class of actions denominated in the books "hard actions," to which a different rule has been applied in numerous cases. Of these actions, and of the rules relating to new trials which are applicable to them, a learned author says: "Hard actions strictly include only civil proceedings, involving in their nature some peculiar hardship, arising from the odium attached to the alleged offense, or the severity of the punishment which the law inflicts on the offender in the shape of damages. To this belong most actions arising *ex delicto*. Trespass, slander, libel, seduction, malicious prosecution, criminal conversation, deceit, gross negligence, actions upon the statute, or *qui tam* actions, prosecuted by informers, and penal actions, prosecuted by special public bodies or the public at large, are ranged under this head. But as they partake, less or more, in their nature and effect, of prosecutions for criminal offenses, the rules that govern in granting or refusing new trials, and the reason of those rules, are drawn from criminal cases, rather than civil." 1 *Grah. & W. New Tr.* p. 503, c. 14.

It is scarcely necessary to say that in criminal prosecutions, after trial and verdict for the defendant, a new trial is never granted. But the rule is not as broad in the class of civil actions mentioned above; yet in those actions it is much broader in favor of defendants than in other civil actions. In the volume last above cited, we find the following statement: "It is a general rule, with but few exceptions, that in penal, and what are denominated 'hard actions,' the court will not set aside the verdict, if for the defendant, although there may have been a departure from strict law in the finding of the jury." Page 353. And, again, on page 523: "In hard actions, a new trial will not be granted, especially if the verdict be for the defendant, although against evidence, nor unless some rule of law be violated." The author proves the correctness of the principles and rules thus laid down by him, by references to large numbers of cases, both English and American; and he satisfactorily demonstrates that, in a case like the present one, a new trial cannot be granted without a violation of well-settled rules of law.

Perhaps as satisfactory a statement of the law on this subject as can be found is contained in *Jarvis v. Hatheway*, 3 Johns. (N. Y.) 180, 3 Am. Dec. 473. Judge Spencer there says: "In penal actions, in actions for a libel and for defamation, and other actions vindictive in their nature, unless some rule of law be violated in the admission or rejection of evidence, or in the exposition of the law to the jury, or there has been tampering with the jury, the court will not give a second chance of success." Add to these other conditions which exist in this case, to wit, that, at the most, the plaintiff is only entitled to recover nominal damages, and that the jury have not disregarded the instructions of the court, and there can be no doubt whatever that the motion for a new trial was properly denied by the court below. Our conclusion is that the judgment of the circuit court must be affirmed. Judgment affirmed.

COMPENSATORY DAMAGES

I. Direct Losses ¹

1. IN TORT

SCHUMAKER v. ST. PAUL & D. R. CO.

(Supreme Court of Minnesota, 1891. 46 Minn. 39, 48 N. W. 559, 12 L. R. A. 257.)

The complaint averred that the plaintiff was a car-repairer in defendant's employ, to whom the defendant owed a duty of furnishing transportation from a point along the line of the road where he had been sent to repair a wrecked caboose, to the city of St. Paul, which it failed to furnish, so that he was compelled to walk to the village of White Bear, nine miles distant, at night in extremely cold and dangerous weather and that, owing to his unpreparedness for exposure by reason of reliance on defendant's performance of its duty, he was made sick, contracted rheumatism and has been permanently injured.

COLLINS, J.² * * * The important question in this case, however, is whether, from the complaint, it appears that defendant is liable for the injuries which resulted from plaintiff's efforts to obtain shelter and food on the occasion referred to; the former, as before stated, arguing that, as alleged, they are too remote, and are not the proximate results of its act. * * * It must not be forgotten that the gravamen of the action is the negligence and carelessness of the defendant in leaving plaintiff at a place where he could not procure either shelter or food. It is an action in tort, and not for a breach of contract. It is the negligence of the defendant which is complained of, and not the breach of a contract to return the plaintiff to St. Paul when he had performed his labor. It was, of course, essential that the plaintiff's relation with the defendant be made to appear, for, unless he was a servant to whom the defendant owed a duty, there could arise no liability by reason of its neglect to perform that duty. The relation of master and servant first having been shown to exist, the law fixes the duty of the former towards the latter, and a violation of this duty is a wrong, not a breach of the contract. This, then, is an action in which the wrongdoer is liable for the natural and probable con-

¹For discussion of principles see Hale on Damages (2d Ed.) §§ 22, 23.

²Part of the opinion is omitted and the statement of facts is rewritten.

sequences of its negligent act or omission; the general rules which limit the damages in actions of tort being, in many respects, different from those in actions on contracts. The injury must be the direct result of the misconduct attributed, and the general rule in respect to damages is that whoever commits a trespass or other wrongful act is liable for all the direct injury resulting therefrom, although such resulting injury could not have been contemplated as a probable result of the act done. 1 Sedg. Dam. 130, note, and cases cited; *Clifford v. Railroad Co.*, 9 Colo. 333, 12 Pac. 219, a case much like this. He who commits a trespass must be held to contemplate all the damages which may legitimately flow from his illegal act, whether he may have foreseen them or not; and, so far as it is plainly traceable, he must make compensation for the wrong. The damages cannot be considered too remote if, according to the usual experience of mankind, injurious results ought to have been apprehended. It is not necessary that the injury in the precise form in which it, in fact, resulted, should have been foreseen. It is enough that it now appears to have been a natural and probable consequence. *Hill v. Winsor*, 118 Mass. 251.

The question is whether the negligent act complained of—leaving the plaintiff in the open country in the nighttime, in extremely cold and dangerous weather, a long distance from shelter or food—was the direct cause of the injuries mentioned in the complaint, or whether it was a remote cause, for which an action will not lie, and it must be taken for granted that the walk of nine miles and incident exposure brought about the alleged sickness, pain, and disability. There was no intervening independent cause of the injury, for all of the acts done by the plaintiff, his effort to seek protection from the inclement and dangerous weather, were legitimate, and compelled by defendant's failure to reconvey him to the city. Had he remained at the caboose, and lost his hands, or his feet, or perhaps his life, by freezing, no doubt could exist of the defendant's liability. It must not be permitted to escape the consequences of its wrong because the injuries were received in an effort to avoid the threatened danger, or because they differ in form or seriousness from those which might have resulted had the plaintiff made no such effort. An efficient, adequate cause being found for the injuries received by plaintiff, it must be considered as the true cause, unless another, not incident to it, but independent of it, is shown to have intervened between it and the result. This is the substance of very clear statements of the law found in *Kellogg v. Railway Co.*, 26 Wis. 223, 7 Am. Rep. 69, and in *Railway Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256. And upon the point now under consideration we fail to distinguish between the case at bar and *Brown v. Railway Co.*, 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41—an action brought to recover for like damages

said to have been caused by directing passengers to alight from a train at a place about three miles distant from their destination. At all events, the question as to what was the proximate cause of a plaintiff's injuries is usually one to be determined by a jury. As was said in *Railway Co. v. Kellogg*, *supra*, the true rule is that what is the proximate cause of an injury is ordinarily one for a jury. It is not a question of science or legal knowledge. It is to be determined as a fact, in view of the circumstances attending it. * * *

WATSON v. RHEINDERKNECHT.

(Supreme Court of Minnesota, 1901. 82 Minn. 235, 84 N. W. 798.)

Action by M. W. Watson against James Rheinderknecht to recover damages alleged to have been sustained by plaintiff by reason of an assault and battery committed by defendant. The altercation arose out of an attempt to recover possession of certain sheep which defendant had sold and delivered to plaintiff. A dispute having arisen as to the quality of the animals delivered defendant attempted to take possession of the property forcibly and meeting with resistance assaulted plaintiff. There was a verdict for defendant, and from an order denying a new trial plaintiff appeals.

COLLINS, J.³ * * * We think it conclusively established that the assault and battery upon the plaintiff was without the slightest justification, that the defendant was the aggressor from beginning to end, and that the jury should have found for the plaintiff in some substantial amount; not nominal damages merely. The trial court should have so instructed.

The court also erred in some of its rulings when receiving testimony. The defendant, young and vigorous, received no injuries, while the plaintiff a feeble man in the neighborhood of 60 years of age, was so injured that he was unable to leave his house for two weeks, and during that time was daily attended by a physician. In 1863, while serving in the army, he had been injured by the explosion of a shell, for which injury he was receiving a pension at the time of the assault and battery. His counsel attempted to show as part of his case the physical condition he was in just prior to the assault, arising from this injury, and how and to what extent his condition had been affected by the acts of the defendant. The court held this evidence inadmissible at that time, and that it was proper in rebuttal only. It subsequently ruled that such testimony was incompetent for any purpose, and refused to

³ Part of the opinion is omitted and the statement of facts is rewritten.

permit plaintiff to show whether his condition at the time of the trial was due to injuries for which defendant was responsible.

The burden was upon the plaintiff to prove such of his injuries as were the direct and proximate result of defendant's acts, and in doing this it was proper to show in what respect, and to what extent, his present condition could be attributed to the assault and battery, and what could be more properly established as the result of his army experience. The injury for which plaintiff was receiving a pension affected his health and enfeebled him unquestionably, but that fact would not deprive him of the right to recover the direct consequences of the defendant's tort—to recover such damages as could be shown to be the direct result of that wrong. That the plaintiff was in ill health, no matter the cause, was no excuse for defendant's acts, and would not relieve him from resulting consequences. The defendant could not be held to respond for injuries arising out of other causes, but as to those for which he was the efficient cause an action would lie.

The rule is that the perpetrator of a tort is responsible for the direct and immediate consequences thereof, whether they may be regarded as natural or probable, or whether they might have been contemplated, foreseen, or expected, or not. It is not necessary, to the liability of a wrongdoer, that the result which actually follows should have been anticipated by him. It is the general character of the act, and not the general result, that the law primarily regards in this connection. 8 Am. & Eng. Enc. Law (2d Ed.) 598, 602, and cases cited.

This rule has been adopted in this state in an action for personal injuries arising out of the negligence of a common carrier (*Purcell v. Railway Co.*, 48 Minn. 139, 50 N. W. 1034, 16 L. R. A. 203), where it was said: "But when the act or omission is negligence as to any and all passengers, well or ill, any one injured by the negligence must be entitled to recover to the full extent of the injury so caused, without regard to whether, owing to his previous condition of health, he is more or less liable to injury."

It was error to exclude testimony tending to show that the injuries received by the plaintiff in the army had been aggravated, intensified, and increased by reason of the defendant's unlawful act, and to just what extent. Nor can these rulings be reconciled with those subsequently made, under which defendant's counsel was allowed to go fully and minutely into plaintiff's condition, actual and asserted, the efficient cause of which was the explosion of the shell, and was permitted to show that plaintiff had applied for an increase of pension two or three times prior to the encounter with plaintiff, and his alleged physical condition when making these applications; the result being that defendant was allowed to fully prove plaintiff's physical condition, as shown and claimed by him in his applications to the government, caused by the army

injury, while plaintiff was prohibited from showing in what manner and to what extent this particular condition had been affected, increased, and aggravated by defendant. * * * Order reversed, and a new trial granted.⁴

2. IN CONTRACT

J. WRAGG & SONS CO. v. MEAD.

(Supreme Court of Iowa, 1903. 120 Iowa, 319, 94 N. W. 856.)

WEAVER, J. Defendant conveyed to plaintiffs by warranty deed a tract of land in the town of Waukee. Plaintiffs were then engaged in the nursery business two miles from Waukee, and allege that they bought the land to be used as a place of storage for nursery stock shipped to them from other dealers, which stock was to be resold and shipped to their customers over the railroads passing through that town. The use to which the property was to be put, it is further alleged, was made known to defendant before the purchase was consummated. It appears, however that prior to the conveyance defendant had leased the land for a year to one Carter, who refused to yield to plaintiffs. Defendant claims to have forgotten the fact of the lease until after the deed was made, but on the next day it is conceded he went to plaintiffs and informed them of the oversight, and tried to adjust the matter, but failed in his effort so to do. Later plaintiffs attempted to get possession of the premises, but were ejected by Carter by legal proceedings of which defendant had notice. The only evidence offered upon the claim of damages is to the effect that, by reason of the failure to secure possession of the land as a place of storage, plaintiffs were obliged to haul all nursery stock received by them during the season to their home nursery, two miles distant, and haul the same back again to the railroad station as shipments were required to meet the demands of their trade, and the extra expense and cost thus necessarily incurred amounted to \$585. The district court ruled that such damages were too remote to support a recovery, and sustained defendant's motion to strike the testimony. There being no other evidence of damage offered, the cause was taken from the jury, and judgment entered against plaintiffs for costs.

The correctness of this ruling of the trial court is the only question presented by the appeal. That damages which are the natural

⁴ See, also, *Vosburg v. Putney*, 78 Wis. 85, 47 N. W. 99 (1890); 80 Wis. 523, 50 N. W. 403, 14 L. R. A. 226, 27 Am. St. Rep. 47 (1891).

and proximate consequence of the breach of a contract, or are such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as the probable consequence of the breach of it, may be recovered from the party in default, is a general rule approved by a multitude of authorities. Frequent difficulty has been found, however, in the application of this principle, and the cases are sometimes in apparent conflict. In the case before us appellants rely chiefly upon the latter phase of the rule cited, insisting that, as appellee was informed of the use to which appellants proposed to put the premises, the parties must have contemplated that damages of the kind claimed would be sustained by the purchasers in the event possession could not be promptly given. The proposition is not sound. The breach of which appellants complain is the existence of an outstanding lease of the premises conveyed. The injury directly and naturally resulting from such breach is the loss of the use or possession of the premises for one year; and it follows of necessity that, generally speaking, the measure of damages is the value of the thing lost—the value of the use of the premises for the period during which the grantees have been excluded therefrom.

It is the appellee's covenant against incumbrances which has been broken, and the law fixing the measure of damages in such cases is well settled. See *Van Wagner v. Van Nostrand*, 19 Iowa, 422, and *Guthrie v. Russell*, 46 Iowa, 269, 26 Am. Rep. 135, and cases hereinafter cited. In an action upon a covenant against incumbrances, where the breach alleged is an outstanding lease of the premises conveyed, the measure of damages is the rental value of the land for the unexpired term. *Alexander v. Bishop*, 59 Iowa, 572, 13 N. W. 714; *Clark v. Fisher*, 54 Kan. 403, 38 Pac. 493; *Edwards v. Clark*, 83 Mich. 246, 47 N. W. 112, 10 L. R. A. 659; *Fritz v. Pusey*, 31 Minn. 368, 18 N. W. 94; *Porter v. Bradley*, 7 R. I. 538; *Moreland v. Metz*, 24 W. Va. 119, 49 Am. Rep. 246; *Rickert v. Snyder*, 9 Wend. (N. Y.) 416; *Christy v. Ogle*, 33 Ill. 295; *Wetherbee v. Bennett*, 2 Allen (N. Y.) 428.

Assuming, then, that the general rule is as laid down in these authorities—and we find none to the contrary—does the fact of appellee's knowledge of the intended use of the premises have the effect to except the case at bar from its operation? The information given appellee was that plaintiffs intended to use the land for the storage of nursery stock. With that fact in mind when he conveyed the land, defendant may properly be held to have contemplated that a loss of the possession for a year would be an injury or damage to appellants to the rental value of such premises for the special purpose to which it was intended to devote them, and if such sum was greater than the rental value for general or ordinary purposes he could have no right to complain. This was the utmost extent of his liability. But no evidence was introduced or

offered tending to show the value of the use of the land for this or any other purpose.

The cost or expense of hauling the stock from the railroad station to the appellants' nursery and back again was contingent, remote, and not the natural or immediate result of the breach of appellee's covenant. So far as shown, appellants simply continued to carry on their business as they had been doing for years. It cannot be presumed that this land afforded the only convenient opportunity in or about Waukee to store and keep their stock. If instead of two miles appellant's nursery had been ten or twenty miles distant, and they saw fit to haul their stock home at an expense of \$1,000 or \$1,500, could it reasonably be said that the parties contemplated the possibility of such stupendous damages arising from the loss of a year's use of a small tract of land sold at a valuation of \$800? Or, if the outstanding lease had proved to be for a term of five or ten years instead of one year, could appellants expect to continue this excessive expenditure and recover it again from their grantor? It would seem a self-evident proposition that such damages are neither the direct, natural, or proximate consequence of the breach of the appellee's covenant against incumbrances, and are too remote and unusual, not to say unreasonable, to have been within the contemplation of the parties to the transaction.

The appellants' claim comes within the class disapproved by this court in *Prosser v. Jones*, 41 Iowa, 674; *Mihills M. Co. v. Day*, 50 Iowa, 252; *Riech v. Bolch*, 68 Iowa, 526, 27 N. W. 507. See, also, *Candy v. Candy*, 10 Hun (N. Y.) 88; *Lovejoy v. Morrison*, 10 Minn. 136 (Gil. 108); *O'Conner v. Nolan*, 64 Ill. App. 357; *Gunter v. Beard*, 93 Ala. 227, 9 South. 389.

It may be admitted that if appellants, on the strength of their purchase of the land, and before learning of the existence of the lease, had expended money or labor in preparing to go into possession, and such expense was rendered unavailing by the refusal of the tenant to vacate, they would be in a position to demand a recovery of the special damages thus sustained. But no such case is made. The sole item of damage claimed is the alleged expense incurred in hauling the nursery stock, and for this no right of action existed.

The judgment of the district court was right, and is affirmed.

II. Consequential Losses⁵

1. PROXIMATE AND REMOTE CONSEQUENTIAL LOSSES

GILSON v. DELAWARE & H. CANAL CO.

(Supreme Court of Vermont, 1892. 65 Vt. 213, 26 Atl. 70; 36 Am. St. Rep. 802.)

Action by E. P. Gilson, receiver of the Dorset Marble Company, against the Delaware & Hudson Canal Company, to recover damages for the flooding of plaintiff's quarry, alleged to be due to the diversion of a water course. The evidence tended to prove that the defendant had, by the construction of its 'railroad embankment, diverted an ancient water course from its accustomed channel into plaintiff's quarry, and had also collected and discharged surface water into said quarry. The railroad of the defendant, at the point complained of, was constructed in 1884, along a steep hillside. At one point there had been for many years a water course which drained at certain seasons of the year a considerable territory. From the point where this water course crossed the line of the defendant's railroad the land gradually descended towards the quarry of the plaintiff. In constructing its railroad the defendant made no provision for the passage of the water running in this water course underneath its track, and the complaint of the plaintiff was that the defendant had thereby diverted this water course, and discharged it, together with the surface water which was collected by this embankment, into his quarry. The land, at the point where the water course crossed the line of the defendant's railroad, belonged to the Vermont Marble Company, as did the land between that point and the plaintiff's quarry. Upon this land of the Vermont Marble Company, and in close proximity to the plaintiff's quarry, were two abandoned quarries, owned by said Vermont Marble Company, and these abandoned quarries were partially filled with water at all times. The effect of the defendant's embankment, as constructed, was to deflect whatever water ran in the water course and whatever surface water ran down the side hill, and to conduct it along the side and into the first of these abandoned quarries. When this quarry became filled with water the water would overflow into the second abandoned quarry, which lay adjacent to the quarry of the plaintiff. This quarry was separated from the plaintiff's quarry by what appeared to be a solid wall of rock. In January, 1888, occurred a freshet in the course of which freshet large quantities of water

⁵ For discussion of principles, see Hale on Damages (2d Ed.) §§ 24-29.

ran down the hillside, were turned by the defendant's embankment, and discharged into the first abandoned quarry. This quarry was filled up by the unusual flood of water, and thereupon the water overflowed into the second abandoned quarry, rising in that quarry to a point considerably above that at which it ordinarily stood. From this quarry it burst through the dividing wall which separated it from the plaintiff's quarry, whereby the damage complained of was done. The evidence of the defendant tended to show that the ancestors of the plaintiff, at some time previous to the construction of the defendant's railroad, had, in the excavation of the plaintiff's quarry, encroached some 8 or 10 feet upon the lands of the Vermont Marble Company, and thereby so weakened the dividing wall that it had burst through under the pressure of the water. The defendant claimed that if the ancestors of the plaintiff had trespassed upon the lands of the Vermont Marble Company, and in so doing so weakened the dividing wall as to occasion the injury in question, the plaintiff could not recover, and requested the court to so instruct the jury. This the court declined to do. There was judgment for plaintiff, and defendant excepts.

ROWELL, J.⁶ It is a maxim of the law that the immediate, not the remote, cause of an event is regarded. In the application of this maxim, the law rejects, as not constituting ground for an action, damage not flowing proximately from the act complained of. In other words, the law always refers the damage to the proximate, not the remote, cause. It is laid down in many cases and by leading text writers that, in order to warrant a finding that negligence or an act not amounting to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable sequence of the negligence or the wrongful act, and that it was such as might or ought to have been foreseen in the light of the attending circumstances; but this rule is no test in cases where no intervening efficient cause is found between the original wrongful act and the injurious consequences complained of, and in which such consequences, although not probable, have actually flowed in unbroken sequence from the original wrongful act.

This is well illustrated by *Stevens v. Dudley*, 56 Vt. 158, which was this: Defendant was a marshal at the fair, and, in chaining the track for a race, he turned off a man's team so negligently that the man was thrown from his wagon, his horse broke loose, and ran against plaintiff's wagon, and injured him. The court below charged that defendant was not liable unless he might reasonably have expected plaintiff's injury to result from his act. Held error, and that the court should have charged that if the

⁶ Part of the opinion is omitted and the statement of facts is rewritten.

defendant negligently turned the team off the track, and thereby the team was deprived of the control of a driver, and became frightened, and ran over plaintiff's team, and caused the injury, without any superior, uncontrollable force, or without the negligence of a responsible agent, having intervened, the defendant would be liable, although he did not anticipate, and might not have anticipated, such consequences from his negligent act; in other words, that the court should have charged that if defendant's act was negligent, and in the natural order of cause and effect the plaintiff was injured thereby, the defendant was liable.

Smith v. Railway Co., L. R. 6 C. P. 14, in the exchequer chamber, is to the same effect. There the company's workmen, after cutting the grass and trimming the hedges bordering the railway, placed the trimmings in heaps between the hedge and the line, and allowed them to remain there for several days during very dry weather, which had continued for some weeks. A fire broke out between the hedge and the rails, and burned some of the heaps of trimmings and the hedge, and spread to a stubble field beyond, and was thence carried by a high wind across the stubble field and over a road, and burned plaintiff's cottage, 200 yards away from where the fire began. There was evidence that an engine had passed the spot shortly before the fire was first seen, but no evidence that it had emitted sparks, nor any further evidence that the fire originated from the engine; nor was there any evidence that the fire began in the heaps of trimmings, and not on the parched ground around them. The court below held that the plaintiff could not recover, because no reasonable man would have foreseen that the fire would consume the hedge, and pass across a stubble field, and so get to plaintiff's cottage, at a distance of 200 yards from the railway, crossing a road in its passage. In the exchequer chamber, Chief Baron Kelly said that he felt pressed, at first, by this view, because he then and still thought that any reasonable man might well have failed to anticipate such a concurrence of circumstances as the case presented; but that, on consideration, he thought that was not the true test of defendant's liability; that it might be that defendant did not anticipate, and was not bound to anticipate, that plaintiff's cottage would be burned as the result of its negligence; but yet, if it was aware that the heaps were lying by the side of the rails, and that it was a dry season, and that, therefore, by being left there, the heaps were likely to catch fire, defendant was bound to provide against all circumstances that might result from this, and was responsible for all natural consequences of it; and with this agreed all the judges. * * *

In the case at bar the defendant, for purposes of its own, wrongfully turned the brook from its natural channel, and let it flow towards plaintiff's quarry, not knowing what would happen, where-

by large and unusual quantities of water were brought to and accumulated in the marble company's abandoned quarries, and it was the duty of the defendants to see that no damage was thereby done; and the fact that it did not know, and had no reason to suspect, that the plaintiff's predecessors had worked their quarry out of bounds, and thereby weakened the wall between it and the adjacent quarry, makes no difference, unless such fact constitutes contributory negligence imputable to the plaintiff. Now, an act or omission of a party injured, or of those for whose acts and omissions he is responsible, in order to constitute contributory negligence, must have related to something in respect of which he or they owed to the defendant, or to those in whose shoes he stands, the duty of being careful, and have been negligent, and in the production of the injury, have operated as a proximate cause, or as one of the proximate causes, and not have been merely a condition.

It follows, therefore, that when there is no duty there can be no negligence. In working their quarry, the plaintiff's predecessors did not know, and could not possibly anticipate, the then non-existent circumstances—that years afterwards the defendant would build a new road where it did in 1884, and wrongfully turn the brook into the quarries above, whereby their quarry would be endangered if they weakened the wall by working out of bounds. Their act in this respect was not wrongful as to the defendant, and they owed the defendant no duty concerning it, and therefore negligence is not predicable of it, even though it was wrongful as to the marble company, with the rights of which the defendant in no way connects itself. The state of the wall, legally considered, was not a proximate cause of the injury, but was merely a condition that made the injury possible. Judgment affirmed.

TOWALIGA FALLS POWER CO. v. SIMS.

(Court of Appeals of Georgia, 1909. 6 Ga. App. 749, 65 S. E. 844.)

Action for damages by George Sims against the Towaliga Falls Power Company. The plaintiff alleged that during the year 1906 he was a tenant of certain lands; that the defendant built a high dam across the Towaliga river some distance below his residence, and backed a large body of water on and over a great area of land near his home; that the ponding of this water and the submerging of the vegetation caused malaria, and contaminated and affected the air with poisonous and deleterious gases; that the pond was a nuisance; that it made him and his family sick, and caused them to lose a large amount of time and to incur expenses of medical treatment and nursing; and that he was deprived of the use of

his premises. By amendment he set up that the pond had incubated, produced, and raised a great many mosquitoes, which infested his land and premises, from which he and his family suffered great annoyance; that his home was rendered uncomfortable, undesirable, and at times almost uninhabitable; that his premises were rendered unhealthy and undesirable as a place to live; that great injury was caused to the land and to the enjoyment thereof and to the use of his home; that mosquitoes which were bred in the pond and which had not previously infested it became a medium for the transmission of malaria and did transmit it to himself and his family, causing them to have malarial fever, which they otherwise would not have had. He prayed for damages on account of the injury to the use of his premises, on account of his own sickness, pain, and suffering, on account of the loss of the services of his wife and minor children, and on account of expenses incurred in connection therewith.

On the trial the plaintiff introduced evidence tending to establish the allegations of his petition. The testimony of the defendant was to the effect that the pond was not stagnant; that there was less stagnant water, etc., in the neighborhood of the plaintiff's premises after the erection of the dam than there was before; that the pond did not cause his sickness; that, if he was sick, he did not have malarial fever; that the mosquitoes about the pond were not of the anophelas (the malaria-bearing) kind. The trial resulted in a verdict in favor of the plaintiff for \$200; and the defendant, having filed a motion for a new trial, which was overruled, brings error.

POWELL, J.⁷ * * * One of the contentions of the plaintiff in error is that if, as the testimony of the expert witnesses strongly indicated, the malarial fever with which the plaintiff and his family, according to his testimony, suffered, was produced in them by the bite of a particular kind of mosquito which was harmless and incapable of carrying the disease unless it had first bitten some other human being already infected with malaria, the relation between the maintenance of the pond, even though it afforded a place for the breeding of the mosquitoes, and the final communication of the disease to the plaintiff, was too remote. Counsel ingeniously, and, we suspect, somewhat facetiously, argue that the mosquito is an animal *feræ naturæ*, and that in an action for damages done by a dangerous animal scienter on the part of the person harboring it is a necessary allegation; citing *Cox v. Murphey*, 82 Ga. 623, 9 S. E. 604, and *Clarendon v. McClelland*, 89 Tex. 483, 34 S. W. 98, 35 S. W. 474, 31 L. R. A. 669, 59 Am. St. Rep. 70. Without making any specific classification of mosquitoes, we hold that they are a common pest, and that the maintenance of a place where they breed in unusual numbers is such

⁷ Part of the opinion is omitted and the statement of facts is rewritten.

a menace to persons residing nearby as to make that place ordinarily a nuisance; and that if, as a result of the maintenance of such a place, the mosquitoes do in fact breed there, as they otherwise would not have bred, and become inoculated with malaria, and, in accordance with what is naturally to be expected, fly abroad and communicate malarial fevers, the proprietor of the breeding place is in legal contemplation proximately the author of the damage.

Testimony that prior to the creation of the pond there were but few mosquitoes and no cases of malarial fever in the community, that the pond had stagnant pools in it favorable to the breeding of mosquitoes, that, following its creation, the mosquitoes appeared in unusual numbers, and an epidemic of malarial fever broke out in the community, would, in connection with expert testimony that malaria is conveyed by mosquitoes, be relevant circumstantial evidence on the question as to whether the creation of the pond caused the epidemic of fever. The range of such testimony, like that in cases of experiments, is largely within the discretion of the trial judge. *Hunt v. Lowell Gas Co.*, 8 Allen (Mass.) 169, 85 Am. Dec. 697. * * * Judgment affirmed.

WOOD v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, 1896. 177 Pa. 306, 35 Atl. 699.)

DEAN, J.⁸ We take the facts as stated by the court below, as follows: "On the 26th of October, 1893, the plaintiff, having bought a return ticket, went as a passenger upon the railroad of the defendant company from Frankford to Holmesburg. After spending the day there, attending to some matters of business, he concluded to come back upon a way train, due at Holmesburg at 5 minutes after 6 in the evening. While waiting for this train, the plaintiff stood on the platform of the station, which was on the north side of the tracks, at the eastern end of the platform, with his back against the wall at the corner. To the eastward of the station, a street crosses the railroad at grade. How far this crossing is from the station does not appear from the evidence. It was not so far away, however, but that persons on the platform could see objects at the crossing. For at least 150 yards to the eastward of the crossing the railroad is straight, and then curves to the right. About 6 o'clock an express train coming from the east upon the north track passed the station, and the plaintiff, while standing in the position described, was struck upon the leg by what proved to be the dead body of a woman, and was injured. The headlight of the approaching locomotive disclosed to one of the witnesses

⁸ Part of the opinion is omitted.

who stood on the platform two women in front of the train at the street crossing, going from the south to the north side of the tracks. One succeeded in getting across in safety, and the other was struck just about as she reached the north rail. How the woman came to be upon the track there is nothing in the evidence to show. There was evidence that no bell was rung or whistle blown upon the train which struck the woman before it came to the crossing, and some evidence that it was running at the rate of from 50 to 60 miles an hour. Upon this state of facts, the trial judge entered a nonsuit." The court in banc having afterwards refused to take off the nonsuit, we have this appeal.

Was the negligence of defendant the proximate cause of plaintiff's injury? Judge Pennypacker, delivering the opinion of a majority of the court below, concluded it was not, and refused to take off the nonsuit. Applying the rule in *Hoag v. Railroad Co.*, 85 Pa. 293, 27 Am. Rep. 653, to these facts, the question on which the case turns is: "Was the injury the natural and probable consequence of the negligence—such a consequence as, under the surrounding circumstances, might and ought to have been foreseen by the wrongdoer as likely to flow from his act?" * * * The rule quoted in *Hoag v. Railroad Co.*, supra, is, in substance, the conclusion of Lord Bacon, and the one given in Brown's Legal Maxims. It is not only the well-settled rule of this state, but is generally, that of the United States. * * * Judge Cooley states the rule thus: "If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some others, and result, and does actually result, in injury, through the intervention of other causes not wrongful, the injury shall be referred to the wrongful cause, passing through those which were innocent." Cooley, Torts, 69.

This, also, is in substance the rule of *Hoag v. Railroad Co.* All the speculations and refinements of the philosophers on the exact relations of cause and effect help us very little in the determination of rules of social conduct. The juridical cause, in such a case, as we have held over and over, is best ascertained in the practical affairs of life by the application to the facts of the rule in *Hoag v. Railroad Co.*

Adopting that rule as the test of defendant's liability, how do we determine the natural and probable consequences, which must be foreseen, of this act? We answer in this and all like cases: From common experience and observation. The probable consequence of crossing a railroad in front of a near and approaching train is death, or serious injury. Therefore, acting from an impulse to self-preservation, or on the reflection that prompts to self-preservation, we are deterred from crossing. Our conduct is controlled by the natural and probable consequence of what our experience

enables us to foresee. True, a small number of those who have occasion to cross railroads are reckless, and, either blind to or disregarding of consequences, cross, and are injured, killed, or barely escape. But this recklessness of the very few in no degree disproves the foreseeableness of the consequences by mankind generally. Again, the competent railroad engineer knows from his own experience and that of others in like employment that to approach a grade highway crossing with a rapidly moving train without warning is dangerous to the lives and limbs of the public using the crossing. He knows death and injury are the probable consequences of his neglect of duty; therefore he gives warning.

But does any one believe the natural and probable consequence of standing 50 feet from a crossing, to the one side of a railroad, when a train is approaching, either with or without warning, is death or injury? Do not the most prudent, as well as the public generally, all over the land, do just this thing every day, without fear of danger? The crowded platforms and grounds of railroad stations, generally located at crossings, alongside of approaching, departing, and swiftly passing trains, prove that the public, from experience and observation, do not, in that situation, foresee any danger from trains. They are there because, in their judgment, although it is possible a train may strike an object, animate or inanimate, on the track, and hurl it against them, such a consequence is so highly improbable that it suggests no sense of danger. They feel as secure as if in their homes. To them it is no more probable than that a train at that point will jump the track and run over them. If such a consequence as here resulted was not natural, probable, or foreseeable to anybody else, should defendant, under the rule laid down in *Hoag v. Railroad Co.*, be chargeable with the consequence?

Clearly, it was not the natural and probable consequence of its neglect to give warning, and therefore was not one which it was bound to foresee. The injury, at most, was remotely possible, as distinguished from the natural and probable consequences of the neglect to give warning. As is said in *Railroad Co. v. Trich*, 117 Pa. 399, 11 Atl. 627, 2 Am. St. Rep. 672: "Responsibility does not extend to every consequence which may possibly result from negligence." What we have said thus far is on the assumption the accident was caused solely by the negligence of defendant, or by the concurring negligence of defendant and the one killed going upon the track with a locomotive in full view. This being an action by an innocent third person, he cannot be deprived of his remedy because his injury resulted from the concurrent negligence of two others. He fails because his injury was a consequence so remote that defendant could not reasonably foresee it. * * *

The judgment is affirmed.

2. CONSEQUENTIAL DAMAGES FOR TORTS⁹

KENTUCKY HEATING CO. v. HOOD.

(Court of Appeals of Kentucky, 1909. 133 Ky. 383, 118 S. W. 337, 22 L. R. A. [N. S.] 588, 134 Am. St. Rep. 457.)

Action for damages by Jessie Hood against the Kentucky Heating Company. There was a judgment for the plaintiff, and defendant appeals.

CARROLL, J.¹⁰ The appellee rented a house on Walnut street in Louisville for the purpose of subletting rooms to boarders. The house consisted of a basement and three stories, the third story being an attic containing two small bedrooms. She paid as rent for the property \$60 a month; and, when the incident out of which this suit arose occurred, several of the rooms in the house were occupied by persons who had rented them from her. Some of these rented rooms had grates, but they were not used, as the appellee heated the entire house by heating gas furnished by the Louisville Gas Company. In May, 1907, Mrs. McDonald, a subtenant, who occupied, as a restaurant, a part of the basement, desired to use in her place the natural gas furnished by the Kentucky Heating Company and applied to this company to connect her stove with its gas mains. At this time there was in that part of the basement, under the control of appellee, three gas meters; two that had been installed by the Louisville Gas Company, one for illuminating gas, and the other for heating gas, the third meter belonging to the Kentucky Heating Company. When the employes of the Kentucky Heating Company went to the residence for the purpose of connecting the stove of Mrs. McDonald with the mains of that company, they disconnected the heating pipes of the Louisville Gas Company, cut out and used some 16 feet of the pipe, took down the meter, and threw it in an ash barrel, thereby cutting off all the heat in the house that was supplied by the Louisville Gas Company. As a result of this all the renters of appellee left, because the weather was too cold to occupy the rooms without heat.

At the time the employes cut off the heat, Mrs. Hood was in the house, but they did not notify her what they were going to do, or what they did, nor did she know anything about it until the renters complained to her of having no heat in their rooms. When she discovered the cause of the trouble, she at once notified the

⁹ For discussion of principles, see Hale on Damages (2d Ed.) § 28.

¹⁰ Part of the opinion is omitted and the statement of facts is rewritten.

Kentucky Heating Company, and requested it to repair the injury its employes had done, and attempted on several different days to get the company to replace the fixtures, but without success. About a week after the pipes were disconnected, the Louisville Gas Company sent its men to the house, and they replaced the fixtures and turned on the heat, charging appellee for this service \$6. Whereupon the appellee brought this suit against the Kentucky Heating Company to recover damages for the willful, malicious, and wrongful acts of the employes in interfering with the heating fixtures of the Louisville Gas Company, thereby not only depriving her of the heat that company furnished, and subjecting her to inconvenience and discomfort, but causing the renters from whom she had been receiving about \$160 a month to leave the premises. * * *

It is insisted that the appellee was only entitled to recover the amount expended by her in replacing the fixtures taken out by the employes of the appellant company, but in this view we do not agree. The appellee had the unquestioned right to heat her house with gas furnished by the Louisville Gas Company, and to enjoy the profit she might have received from the persons to whom she rented rooms; and it is equally plain that the employes of the appellant had no right or authority to in any manner interfere with or disturb the fixtures by which the heat was obtained. And the evidence conduces to show that at the time the heating fixtures were removed, it was necessary that the rooms of the house should be heated in order to make them comfortable and habitable, and also that the deprivation of the heat caused the renters to leave. As appellant's servants wrongfully deprived appellee of the convenience and comfort of having her house heated, and also by this conduct caused her to lose the income she received from the tenants, she was entitled to recover as compensation, not only the cost of replacing the fixtures, but in addition thereto reasonable compensation for the loss she sustained in being deprived of her tenants, and for personal inconvenience and discomfort. It would fall far short of the relief to which appellee was entitled to limit her recovery to the money she was required to pay out to have the injury repaired. A person cannot either negligently or wantonly injure the property of another, thereby causing the other to suffer loss in business or profits, or in the denial of the ordinary and reasonable comforts he enjoyed, and then assert that all the injured party is entitled to recover is the cost of replacing the injured property.

Waiving, for the moment, the question of exemplary damages, we may lay it down that, whenever a person is injured in his person or property by the wrongful act of another, he is entitled to recover such a sum as will fairly compensate him, not only for the actual loss sustained, but for such consequential damages as

may spring from the deprivation of business or profits as are the direct or proximate result of the tort complained of, if such consequential damages are capable of reasonable ascertainment, and in addition thereto, the facts justifying it, compensation for personal inconvenience and discomfort. In the case before us the loss sustained by appellee, aside from personal inconvenience and discomfort, was not only the sum she paid out for having the fixtures replaced, but the loss she suffered in being deprived of the profit she had the right to expect would be received from the renters. This profit was not uncertain or speculative. It was as reasonably sure as any kind of business profit can be that depends upon the development or happening of the future; and, furthermore, it was capable of reasonable ascertainment by a jury. The appellee, when her tenants left, was receiving from them a fixed sum. This income she lost when they withdrew from her premises, and the loss of this source of income was the proximate result of the wrongful act complained of.

It is not material whether it was in the contemplation of the wrongdoers that loss of business or profit would result to the injured party. In actions for breach of contracts the rule generally held to is that only such damages can be recovered as are actually sustained, or such as it is reasonable to conclude were within the contemplation of the parties at the time the contract was entered into. 2 Chitty on Contracts, p. 1324. But this measure that obtains in contracts will not be applied in actions sounding in tort. There is a wide difference between the rights and remedies allowable in the one case and in the other. 1 Sutherland on Damages, § 15. It is the wrongful act done, and the consequences that naturally result from it, that the law looks at and holds the wrongdoer responsible for. A person who commits a tort like this is liable for all the damages that naturally flow from, and are the result of, this wrongful act, although he may not at the time have given any thought to or have anticipated that injurious consequences would follow. It is no excuse or defense for the wrongdoer that he did not mean to commit any wrong, or did not know that any injury or loss would ensue.

The general rule in respect to the recovery of consequential damages in cases of tort is very well stated in Sutherland on Damages (volume 1, § 16): "In an action for a tort, if no improper motive is attributed to the defendant, the injured party is entitled to recover such damages as will compensate him for the injury received so far as it might reasonably have been expected to follow from the circumstances; such as, according to common experience and the usual course of events, might have been reasonably anticipated." The damages are not limited or affected so far as they are compensatory, or by what was in fact in contemplation by the party in fault. He who is responsible for a negligent

act must answer 'for all the injurious results which follow therefrom, by ordinary natural sequence.' * * * Whether the injurious consequences may have been 'reasonably expected' to have followed from the commission of the act is not at all determinative of the liability of the person who committed the act to respond to the person suffering therefrom. * * * There need not be in the mind of the individual whose act or omission has wrought the injury the least contemplation of the probable consequences of his conduct; he is responsible therefor because the result proximately follows his wrongful act or nonaction. All persons are imperatively required to foresee what will be the natural consequences of their acts and omissions, according to the usual course of nature and the general experience." See, also, note to *Wallace v. Pennsylvania R. Co.*, 195 Pa. 127, 45 Atl. 685, 52 L. R. A. 33; *Wyant v. Crouse*, 127 Mich. 158, 86 N. W. 527, 53 L. R. A. 626; 13 Cyc. pp. 28, 29, 49; *Gregory v. Slaughter*, 124 Ky. 345, 99 S. W. 247, 8 L. R. A. (N. S.) 1228, 124 Am. St. Rep. 402. * * *

Upon the whole case we see no reason for disturbing the judgment, and it is affirmed.

DOW v. WINNIPESAUKEE GAS & ELECTRIC CO.

(Supreme Court of New Hampshire, 1898. 69 N. H. 312, 41 Atl. 288, 42 L. R. A. 569, 76 Am. St. Rep. 173.)

Case by Cyrus P. Dow against the Winnepesaukee Gas & Electric Company for negligently permitting the escape of gas, whereby the plants in the plaintiff's greenhouses were injured and destroyed, and the plaintiff was otherwise injured in his business as a florist. In March, 1897, he was damaged by the escape of gas through a break in a pipe located in the street in front of his premises. The escaping gas, permeating through the ground, entered his houses and killed his growing plants. The break was due to the improper, careless, and unskillful manner in which the pipe was laid, and would have been prevented by the exercise of ordinary care and skill in laying the pipe.

In addition to the direct damage to his plants, and certain items of expense, the plaintiff claimed special damage to his business resulting from the fact that plants which he thought were unaffected, and sold, proved to be weakened by the exposure to gas, and did not grow as they otherwise would, and that thereby his business reputation was injured.

BLODGETT, J.¹¹ * * * The special damages claimed and allowed for the injury to the plaintiff's business reputation, on account of his sales of damaged plants, were not properly recoverable, and must be disallowed as too remote. There are cases undoubtedly where the

¹¹ Part of the opinion is omitted and the statement of facts is rewritten.

tort complained of is of such a nature that the law will not nicely attempt to limit the amount of reparation, but will extend the line of relief so as to embrace all the consequences of the wrongdoer's conduct, although quite remote from the original transaction; but, as a general rule, it may be said that, in cases of tort without special aggravation, where the conduct of the defendant cannot be considered so morally wrong or grossly negligent as to give a right to exemplary or vindictive damages, the extent of the plaintiff's remuneration is restricted to such damages as are the legal and natural consequences of the defendant's wrongful act. 1 Sedg. Meas. Dam. (7th Ed.) 144, and authorities cited.

This rule has been recognized in a multitude of cases, and when applied to the present case, it renders the injury to the plaintiff's reputation far too remote for legitimate compensation. The full damage to the plaintiff's plants was a proper matter for inquiry, but the consequence to his reputation resulting from a sale of the plants to his customers, "reasonably supposing them sound," was obviously beyond the range of such inquiry, and conjectural merely. It was altogether too shadowy and indirect for legal consideration, and must be regarded as an unexpected, unnatural, and accidental consequence of the defendants' wrong. The result is that the plaintiff is entitled to recover the damage to his plants * * * and also the value of the extra coal burned by him, as found by the trial justice—amounting together to the sum of \$263. Judgment accordingly.

3. CONSEQUENTIAL DAMAGES FOR BREACH OF CONTRACT ¹²

(A) *In General*

HADLEY et al. v. BAXENDALE et al.

(Court of Exchequer, 1854. 9 Exch. 341.)

The plaintiffs carried on an extensive business as millers at Gloucester; and on the 11th of May their mill was stopped by a breakage of the crank shaft, by which the mill was worked. The steam engine was manufactured by Messrs. Joyce & Co., the engineers, at Greenwich, and it became necessary to send the shaft as a pattern for a new one to Greenwich. The fracture was discovered on the 12th, and on the 13th the plaintiffs sent one of their servants to the office of the defendants, who are the well-known car-

¹² For discussion of principles, see Hale on Damages (2d Ed.) § 29.

riers trading under the name of Pickford & Co., for the purpose of having the shaft carried to Greenwich. The plaintiffs' servant told the clerk that the mill was stopped, and that the shaft must be sent immediately; and in answer to the inquiry when the shaft would be taken the answer was that if it was sent up by twelve o'clock any day it would be delivered at Greenwich on the following day. On the following day the shaft was taken by the defendants, before noon, for the purpose of being conveyed to Greenwich, and the sum of £2. 4s. was paid for its carriage for the whole distance. At the same time the defendants' clerk was told that a special entry, if required, should be made, to hasten its delivery. The delivery of the shaft at Greenwich was delayed by some neglect, and the consequence was that the plaintiffs did not receive the new shaft for several days after they would otherwise have done, and the working of their mill was thereby delayed, and they thereby lost the profits they would otherwise have received.

On the part of the defendants it was objected that these damages were too remote, and that the defendants were not liable with respect to them. The learned judge left the case generally to the jury, who found a verdict with £25. damages beyond the amount paid into court by defendant, which was £25.

ALDERSON, B. We think that there ought to be a new trial in this case; but in so doing we deem it to be expedient and necessary to state explicitly the rule which the judge, at the next trial, ought, in our opinion, to direct the jury to be governed by when they estimate the damages.

It is indeed, of the last importance that we should do this; for, if the jury are left without any definite rule to guide them, it will, in such cases as these, manifestly lead to the greatest injustice. The courts have done this on several occasions; and in *Blake v. Railway Co.*, 21 L. J. Q. B. 237, the court granted a new trial on this very ground, that the rule had not been definitely laid down to the jury by the learned judge at nisi prius. "There are certain established rules," this court says, in *Alder v. Keighley*, 15 Mees. & W. 117, "according to which the jury ought to find." And the court in that case adds: "And here there is a clear rule that the amount which would have been received if the contract had been kept is the measure of damages if the contract is broken." Now, we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally—i. e., according to the usual course of things, from such breach of contract itself—or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.

Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now, the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract. It is said that other cases, such as breaches of contract in the nonpayment of money, or in the not making a good title to land, are to be treated as exceptions from this, and as governed by a conventional rule. But as, in such cases, both parties must be supposed to be cognizant of that well-known rule, these cases may, we think, be more properly classed under the rule above enunciated as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule.

Now, in the present case, if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made were that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill. But how do these circumstances show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiffs had another shaft in their possession, put up or putting up at the time, and that they only wished to send back the broken shaft to the engineer who made it, it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. Or, again, suppose that, at the time of the delivery to the carrier, the machinery of the mill had been in other respects defective, then, also, the same results would follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, and that the want of a new one was the only cause of the stoppage of the mill, and that the loss of profits really arose from not sending down the new shaft in

proper time, and that this arose from the delay in delivering the broken one to serve as a model. But it is obvious that in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred; and these special circumstances were here never communicated by the plaintiffs to the defendants.

It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants. The judge ought, therefore, to have told the jury that upon the facts then before them they ought not to take the loss of profits into consideration at all in estimating the damages. There must therefore be a new trial in this case.¹³

(B) Damages Arising under Ordinary Circumstances

TAYLOR v. SPENCER.

(Supreme Court of Kansas, 1907. 75 Kan. 152, 88 Pac. 544.)

Action by W. W. Spencer against F. D. Taylor and J. W. Reeves to recover damages sustained on account of the breach of a contract. Defendants owned certain mineral springs at Geuda Springs, and agreed to supply plaintiff for five years with sufficient mineral water to supply the trade at Wichita, Kansas. The contract provided that plaintiff should supply the necessary vessels in which to ship the water to Wichita, pay all expressage and freight and use his best endeavors to push the sale of the water. The plaintiff accordingly moved with his family to Wichita, provided the necessary tanks, jugs and bottles, purchased a delivery wagon and horse, rented an office, incurred expenses for advertising and for other incidentals. After fifteen months defendants refused to furnish the water and the business ceased. On the trial the jury made special findings to the effect that plaintiff's losses for loss of time, expenses incurred, etc., amounted to \$2,889. There was a judgment in favor of plaintiff for \$2,500, and defendants bring error.

¹³ See comment on this case in *Harper Furniture Co. v. Southern Express Co.*, post, p. 53.

GRAVES, J.¹⁴ * * * The plaintiffs in error insist that in any view of the case the plaintiff could recover nominal damages only. The measure of recovery adopted by the court is stated in instruction 15, which reads: "If you find from the evidence in this case that after the execution of the contract introduced in evidence the plaintiff entered upon the performance of his part of said contract; that he spent money in advertising the merits of said Geuda Springs mineral water; that he expended money in purchasing the necessary equipment so as to carry out the provisions of his part of said contract; that he spent his time and his labor in introducing said mineral water so as to supply the trade of Wichita and other expenses under the provisions of said contract up and until the time that said defendants refused to ship said water had complied with all the terms of said contract—then the defendants would not have the right to terminate said contract, and, if they did so, it was a violation of their part of said agreement, and they would be liable to the plaintiff in damages for the amount of such expenditures expended in good faith in reliance upon said contract, less profits, if any, you find accrued to him during the time that said contract was being carried out by said plaintiff, and in this connection you are instructed that the value of plaintiff's time and labor expended in introducing said mineral water and in carrying out his part of said agreement is to be considered by you as legitimate element of expense which is recoverable the same as money actually expended, if you find for the plaintiff as herein instructed. And you are further instructed that if he was unable to enter a like business or employment at Wichita, Kan., and that he made a reasonable effort to enter such like business or employment, you may allow him such reasonable compensation for lost time after the contract was canceled to the time he was able to secure other employment or engaged in business as you may find he is entitled to under the evidence, and you may take into consideration the loss, if any, sustained by the plaintiff in being compelled to dispose of personal property which he had purchased for the purpose of carrying on said business, and which, after said contract had been broken by said defendants, was no longer useful or necessary to the plaintiff."

We do not think this instruction erroneous. The measure of damages therein stated is correct as applied to this case. The plaintiff in order to carry out the contract was compelled to go to the city of Wichita to live. It was necessary for him to provide proper equipments for carrying on the business, and to incur expenses in advertising the valuable qualities of the water. These expenses were contemplated by both parties. The plaintiff by the terms of the contract was required to pay all expenses, and "to

¹⁴ Part of the opinion is omitted and the statement of facts is rewritten.

use his best endeavors to push the sale of said mineral water." The outcome of the enterprise was unknown, but the plaintiff was willing to take the hazard on his part, in consideration of the stipulations in the contract on the part of the defendants. His time was taken from other enterprises which might have yielded remunerative returns. Money was expended which might have been otherwise invested, all upon the faith and expectation of profits to be realized after a permanent trade had been established. If he had been permitted to prosecute the business during the time stipulated in the contract, he alone would have been responsible for the results. But, after the plaintiff had made the sacrifice and expenditures necessary to the initiation of this new enterprise, the defendants wrongfully cut off all the expectations of growth and development entertained by the plaintiff, and left him without business, with useless equipments on hand, with no compensation for the time and effort expended, and his entire investment a failure.

Under such circumstances it seems but fair and reasonable that the defendants should reimburse the plaintiff for all the direct losses sustained by him on account of their wrongful acts. We do not think the instruction of the court overstates these losses. No future profits are included. The inquiry is limited to the actual loss sustained. The rule applicable to such cases is stated by Justice Bradley in *U. S. v. Behan*, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168, thus: "When a party injured by the stoppage of a contract elects to go for damages for the breach thereof, the first and most obvious damage to be shown is the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services. Unless there is some artificial rule of law which has taken the place of natural justice in relation to the measure of damages, it would seem to be quite clear that the claimant ought to at least be made whole for losses and expenditures. So far as appears, they were incurred in the fair endeavor to perform the contract which he assumed. If he chooses to go further, and claim for the loss of anticipated profits, he may do so, subject to the rules of law as to the character of profits which may be thus claimed. It does not lie, however, in the mouth of the party who has voluntarily and wrongfully put an end to the contract to say that the party injured has not been damaged, at least to the amount of what he has been induced fairly and in good faith to lay out and expend, including his own services." See, also, 8 Am. & Eng. Enc. of Law, 637, 638; *Bulkley v. U. S.*, 19 Wall. 37, 22 L. Ed. 62.

The general verdict was for \$2,500. According to the special findings it might properly have been \$2,889. The court entered judgment in favor of the plaintiff for the lesser amount. * * *

The judgment is affirmed.

HEDDEN v. SCHNEBLIN.

(Court of Appeals of Missouri, 1907. 126 Mo. App. 478, 104 S. W. 887.)

Action by B. C. Hedden against George Schneblin for damages for breach of contract. The plaintiff purchased a dairy of the defendant as administrator of the estate of one Doubet. The property was incumbered by a chattel mortgage to secure two sureties who had indorsed Doubet's note to a bank for \$988. Plaintiff and defendant agreed on a sale at the sum of \$1,800, but plaintiff was able to pay only \$812 of the purchase price, and, in order to effect the sale, defendant agreed to lend him the remainder of \$988 for one year, and to make the loan in time for the proceeds to be used in paying off the debt of the estate to the bank, which would become due in about one month. The sale was closed on this agreement, and plaintiff paid to defendant \$812 and took possession of the property. When the bank note matured, defendant failed to advance the money necessary to pay it, and later refused to make the loan on the terms agreed. Plaintiff then attempted to borrow the money elsewhere, but was unsuccessful. In the meantime the holders of the chattel mortgage, becoming impatient, had advertised the property for sale. The proceeds of the sale were barely sufficient to discharge the mortgage debt, and this action is to recover from defendant in his individual capacity the value of the property above the amount of the incumbrance.

The trial judge instructed the jury in substance that if they found the facts to be as alleged by the plaintiff and that, by reason of defendant's failure to loan the money to plaintiff according to agreement, the property was lost to plaintiff, they should assess his damages at the reasonable market value of the property over and above the amount of the mortgage, not to exceed \$800. The jury returned a verdict for plaintiff for \$800, and, a motion for new trial being denied, defendant appeals.

JOHNSON, J.¹⁵ * . * * Passing to the second proposition advanced by defendant, we cannot agree with his contention that plaintiff's recovery should have been limited to nominal damages. Adopting plaintiff's version of the facts, it appears that the actual value of the property exceeded the incumbrance by more than \$800, the amount of the verdict; that plaintiff was a stranger in the community where the dairy was operated; that, when defendant refused to perform his agreement, plaintiff endeavored unsuccessfully to borrow the money elsewhere; and that his interest in the property was lost to him in consequence of defendant's breach. The general principle controlling the measurement of damages in actions founded on breach of contract is that compensation should

¹⁵ Part of the opinion is omitted and the statement of facts is rewritten.

be equal to the injury, but only such consequential damages are allowed as may be said to be the natural and proximate consequence of a breach; i. e., such as ordinarily results in that class of cases. Remote, indirect, or speculative damages are not recoverable. Hence, where the breach is of an agreement to lend money at a particular time, the general rule is that the measure of damages is the amount of the difference between the interest on the loan at the contract rate and at the rate (not exceeding that permitted by law) which the borrower would have had to pay for the money in the market, since, in legal contemplation, money is always in the market and procurable at the lawful rate of interest. But the controlling rule to be applied in settling the question of whether a recovery of consequential damages peculiar to the given case should be allowed is to ascertain whether from the terms of the contract, considered in the light of its special circumstance known to both contracting parties, it reasonably may be said that the special injury was the natural and proximate result of the breach of a contract made under such special circumstances. Whenever a direct causal relation is disclosed between the wrongful act and an injurious result, then such a result must be deemed to have been within the contemplation of the parties at the time they entered into the contract, and the delinquent party should be held to answer in damages for the special injury thus inflicted. 1 Sutherland on Damages (3d Ed.) §§ 50, 77; Mo. Real Estate Syn. v. Sims, 179 Mo. 679, 78 S. W. 1006; Pettit v. Carpenter, 86 Mo. App. 452; Gallup v. Miller, 25 Hun (N. Y.) 298; Banewur v. Levenson, 171 Mass. 1, 50 N. E. 10; Doushness v. Burger Brewing Co., 20 App. Div. 375, 47 N. Y. Supp. 312; Cole v. Stearns, 162 N. Y. 637, 57 N. E. 1106; Atherton v. Williams, 19 Ind. 105.

Special circumstances exist in the present case which would make the application of the rule under which nominal damages only could be recovered a flagrant injustice. Plaintiff would not have purchased the property but for the assurance of the loan for the time agreed. Defendant made the promise as an inducement to the sale, knowing that plaintiff was in a position, owing to his lack of other means and to the fact that the amount of the incumbrance as compared to the value of the property was so great, that he could not go into the money market and offer security on which he could hope to procure a loan. Under such special circumstances to hold that in legal contemplation the money was in the market for him, and that all he had to do was to go and get it, would be just as false as it would be unjust. A fiction of this character, though its use may be justified as a shield to protect the contract breaker against liability for remote damages, should not be employed to protect him from liability for those damages he must have known would be sustained by the injured

party. * * * Plaintiff was the victim of defendant's wrong, and should be adequately compensated.

The instructions given expound the law fairly; and it follows that the judgment must be affirmed. All concur.

HAMMER v. SCHOENFELDER.

(Supreme Court of Wisconsin, 1879. 47 Wis. 455, 2 N. W. 1129.)

COLE, J.¹⁶ The only question in this case relates to the rule of damages for the failure of the defendant to supply ice according to his contract. The plaintiff was a butcher by trade, and the defendant undertook and agreed to furnish him with what ice he might require for his ice box, in which he kept fresh meat, at a stipulated sum, for the season of 1878.

About the last of July the defendant stopped supplying ice, and refused any longer to furnish the plaintiff with ice for his box. In consequence the plaintiff lost considerable fresh meat, which spoiled for want of ice. The defendant had supplied the plaintiff with ice the previous season, and well understood the use to be made of the ice which he contracted to deliver. Nothing was paid by the plaintiff on the contract. * * *

Of course this was an action for a breach of the contract, but as the defendant fully knew the use which the plaintiff wished to make of the ice he agreed to deliver, namely, to supply his ice box in order to preserve fresh meat, there is no hardship in allowing the plaintiff to recover "not only general damages—that is, such as are the necessary and immediate result of the breach—but special damages, which are such as are the natural and proximate consequence of the breach, although not in general following as its immediate effect." * * *

Now, as the defendant was acquainted with all the special circumstances in respect to this contract—knew for what purpose the ice agreed to be furnished by him was to be used—he should fully indemnify the plaintiff for the loss he sustained by non-delivery of the ice, and he was, therefore, justly chargeable in damages for the meat spoiled in consequence of the inability of the plaintiff to procure ice elsewhere. This is a legitimate element to be considered in estimating the plaintiff's damages. It is a consequence which "may reasonably be supposed to have been in the contemplation of both parties, at the time of making the contract, as the probable result of the breach of it." * * *

¹⁶ Part of the opinion is omitted.

(C) Damages Arising from Circumstances Not Contemplated

HUNT BROS. CO. v. SAN LORENZO WATER CO.

(Supreme Court of California, 1906. 150 Cal. 51, 87 Pac. 1093,
7 L. R. A. [N. S.] 913.)

Action by the Hunt Bros. Company and others against the San Lorenzo Water Company. From a judgment for defendant, rendered on sustaining a demurrer to the complaint, the plaintiffs having failed to amend, the plaintiffs appeal.

The action was brought to recover \$124,496.98, damages, resulting from the destruction of certain property, the injury to other property, and a loss of profits from an established business, all occasioned by a fire, which occurred on April 12, 1901, which fire occurred without any fault on the part of plaintiff. The corporation, Hunt Bros. Company, was the owner of all said property. The plaintiff was engaged in the business of fruit canning, packing, manufacturing cans, storage of fruits, canned goods, etc. The property injured and destroyed consisted of certain buildings used and occupied in the conduct of said business, machinery, and other implements used in such business, and the stock on hand, and 74 cottages occupied by employes of plaintiff.

The allegations of the complaint upon which it is sought to hold defendant liable for the amount of this loss are substantially as follows: Defendant was a water company, engaged in the business of supplying water. Some time between September, 1900, and March, 1901, plaintiff and defendant entered into an agreement, whereby defendant agreed to lay a six-inch main from one of its mains charged and supplied with water, to a point near one corner of plaintiff's premises, to connect said premises with this new main by a service pipe, and to thereupon supply plaintiff, by means thereof, with water. Defendant further agreed that it would erect and install a fire hydrant near said premises, to be used by plaintiff in case the premises should take fire, and connect the same with said main, and supply plaintiff, by means thereof, with water for the purpose of extinguishing any fire which might occur on said premises. No time was specified for the commencement or completion of this work. Defendant laid the new main to a point near one corner of plaintiff's premises, as agreed, but failed to install the service pipe or the fire hydrant. On March 14, 1901, plaintiff remonstrated with defendant because of its failure to do these things, and defendant, on March 15, 1901, promised in writing that it would "immediately commence the work" of putting in

the service pipe to connect the premises with the main, and also that it would "immediately commence the work" of erecting and installing said fire hydrant and connecting the same with the main. It failed to commence to do either of these things prior to the fire.

ANGELLOTTI, J.¹⁷ * * * It is the well-settled general rule of damages for any breach of contract that the damages that can be recovered for a breach are only such as may reasonably be supposed to have been within the contemplation of the parties at the time of the making of the contract, as the probable result of a breach. Other damages are too remote. In this lies the distinction between damages for breach of contract and damages for tort; the rule as to tort being that the injured person may recover for all detriment proximately caused thereby, "whether it could have been anticipated or not." Section 3333, Civ. Code. Such, as we understand it is the rule declared by section 3300 of the Civil Code, as that section has always been construed by this court, and it is the rule enunciated in the leading case of *Hadley v. Baxendale*, 9 Exch. 341, which has been universally accepted and followed. See *Mitchell v. Clarke*, 71 Cal. 165, 11 Pac. 882, 60 Am. Rep. 529.

As has often been suggested by writers upon this subject, the remote effects of slight causes are so beyond all possible conception of the parties to a contract, both in character and extent, that any other rule would practically preclude the making of contracts altogether, for no sane person could be expected to assume such uncertain and limitless liability. This rule does not mean that the parties should actually have contemplated the very consequence that occurred, but simply that the consequence for which compensation is sought must be such as the parties may be reasonably supposed, in the light of all the facts known, or which should have been known to them, to have considered as likely to follow in the ordinary course of things, from a breach, and therefore to have, in effect, stipulated against. The understanding and intention of the parties in this regard must, of course, be ascertained from the language of the contract, in the light of such facts. See *Sutherland on Damages*, § 45.

Where a contract calls for the continuance of an instituted water service for the purpose of extinguishing fires, loss by fire as the consequence of a breach may, as already suggested, be reasonably supposed to have been within the contemplation of the parties. This may also be true in the event of such a service contracted to be commenced at a certain definite time in the future, especially if the special circumstances are such as to make it essential that the particular protection from fire to be thereby afforded should

¹⁷ Part of the opinion is omitted and the statement of facts is rewritten.

commence at that time, and those circumstances were made known to the person or company contracting to furnish the service. As to this, however, it is not necessary here to decide.

The contract here alleged was, in effect, first, to lay and install certain pipes through which water for general use might be supplied, and to install one fire hydrant, through which water for use in the event of fire might be supplied; and, second, such pipes and fire hydrant having been installed, thereupon to commence supplying water for those purposes, and to continue supplying it at certain prescribed rates. No time whatever was prescribed for the completion of the work essential to the furnishing of such water, or for the commencement of the water service, except that it was to commence upon the installation of the necessary pipes and hydrant. We attach no importance to the subsequent "promise" of March 15, 1901, on the part of defendant, that it would "immediately commence the work" essential to the installing of the service for the various purposes designated.

Giving this additional promise full force as a part of the contract between the parties, there was therein no undertaking on the part of defendant that the work so to be commenced would be completed and the water service instituted at any certain definite time. There was no allegation whatever as to any special circumstances known to defendant, or, for that matter, to plaintiff, making it essential to the protection of the property from fire that the contemplated service should be commenced within any particular time. The case presented, then, is one where the parties simply agreed upon the installation and commencement of a water service for various purposes, including one hydrant to be used for the extinguishment of possible fires, upon the installation and commencement of which the plaintiff was to commence paying, at certain prescribed rates, for the water furnished; no definite time for the commencement of such service being fixed, and no special circumstance appearing, by reason of which it might be anticipated that it was essential to the protection of plaintiff's property from fire that the service should be commenced within any particular time, or, as plaintiff claims, within a reasonable time.

Under such circumstances, it appears very clear to us that damage by fire to plaintiff's property cannot reasonably be supposed to have been within the contemplation of the parties, as possible to be caused by a failure on the part of defendant to commence the water service agreed upon. The plaintiff not having stipulated for the limited protection against fire, to be furnished thereby, to commence at or within any particular time, and, under the terms of the contract, paying for such protection only from the time of the actual commencement thereof, could not, until the actual commencement of the service, be considered as relying on such protection, or on the commencement thereof at any particu-

lar time, in the slightest degree, and there was nothing to warrant even a supposition on the part of defendant that plaintiff did so rely. The utmost that can be reasonably contended to have been within the contemplation of the parties in this regard was that, when at some future indefinite time the hydrant had once been installed, and the service actually commenced, water would thenceforth be available, by means of the hydrant, for the extinguishment of possible fires, and that any failure to then have it so available, in the event of a fire, might cause damage to plaintiff's property. This was the full extent of the contract of the parties, and the parties could not be understood as stipulating for such protection prior to the actual commencement of the service.

This being so, whatever might be the proper measure of damage for a breach of contract in failing to install the service within a reasonable time, loss of property by fire could not be an element thereof. Until the actual assumption of the duty of such protection, damage by fire could not be held to be within the contemplation of the parties as a possible consequence of a breach, and in no legal sense of the words could such damage be held to have been caused by the breach alleged, although, if it had not been for such breach, water might have been available for the extinguishment of the fire. The case is no different in principle from one where water is furnished by contract for other than fire purposes, and a fire occurs which could have been extinguished by such water if it had been available, but, owing to some failure of the person furnishing the water, no water is available, and the property is destroyed. As already stated, although in such a case the breach is, in one sense of the words, a cause of the loss, there could be no recovery, for the water company has not assumed the duty of protecting the other's property from fire, and loss by fire is not therefore damage possible within the contemplation of the parties to the contract. Here, although water was ultimately to be furnished for fire purposes, the defendant had not, under the terms of its contract, assumed the duty of so protecting plaintiff's property at the time of the fire. * * * The judgment is affirmed.

BROWN et al. v. COWLES.

(Supreme Court of Nebraska, 1904. 72 Neb. 896, 101 N. W. 1020.)

Commissioners' Opinion. Action by Gardner Cowles against Daniel C. Brown and Abraham L. Hoover. Judgment for plaintiff. Defendants bring error.

LETTON, C.¹⁸ This action was brought by defendant in error, Gardner Cowles, as plaintiff, against James M. Neff as principal,

¹⁸ Part of the opinion is omitted.

and the other defendants as sureties, upon an obligation given to secure the faithful performance by Neff of a contract made between Cowles and him for carrying the United States mail, as a subcontractor, between the city of Lincoln and the post office at Lancaster. The petition sets up the contract, and alleges a breach of the same by Neff's refusing to further carry the mail, and pleads that the plaintiff was put to great expense and damage in procuring another person to complete the contract. A general denial was filed by the defendant, the case tried to the court without the intervention of a jury, and a judgment rendered in favor of the plaintiff for the sum of \$77.40. * * *

It is objected that the court erred in the amount of recovery. The plaintiff asks judgment for \$110.40, the items of the claim being as follows: Hiring one Poppleton to obtain a man to complete the contract, \$30; Poppleton's car fare from Algona, Iowa, to Lincoln, Neb., \$20; increased salary for a man to complete the contract for 2½ years, \$45; Poppleton's hotel expenses and street car fare, \$10; other expenses in carrying mail, \$5.40. The rule is elementary that, in an action for damages for breach of contract, such damages only may be recovered as are the probable, direct, and proximate consequences of the wrong complained of, and such as may fairly be supposed to have been within the contemplation of the parties, at the time of the making of the contract, as the probable result of the breach of the same. It requires no argument to show that the hiring of a man in the state of Iowa, sending him to Nebraska, and paying his wages, hotel, and other expenses, could not reasonably be within the contemplation of the parties as the result of a failure of Neff to perform the contract. If Neff could be charged with railroad fare from Iowa, he could with equal propriety be charged with railroad fare from New York. There are no extraordinary conditions requiring such expenditures pleaded or proved. Such damages are entirely too remote, and cannot be recovered.

Whatever excess the plaintiff was compelled to pay in order to procure the services of another person at a reasonable and proper rate to furnish the services which Neff had agreed to perform, and which the plaintiff was bound to perform under his contract with the government, are proper and necessary items of damage which the plaintiff is entitled to recover in this action. By its terms the contract terminated on the 30th day of June, 1902. This action was begun on the 21st day of March, 1901. The plaintiff is not entitled to recover in this action for damages which accrued after the action was brought. *Wittenberg v. Mollyneaux*, 59 Neb. 203, 80 N. W. 824. Neff refused to carry out the agreement on the 20th day of December, 1899. The plaintiff, therefore, would be entitled to recover the increased compensation which he was required to pay over and above the amount of the contract from the

20th day of December, 1899, when Neff refused to perform, until the 21st day of March, 1901, when this action was commenced. At the rate of \$18 per year, this amounts to \$22.50. There is evidence that between the time that Neff refused to further carry on the contract and the time that a new contract was made with another subcontractor the plaintiff was required to pay the sum of \$5.40 to other parties, for carrying the mail, in excess of the amount which he had agreed to pay Neff. The plaintiff seems to be entitled to the items of \$22.50 and \$5.40 paid in excess of the contract price, with interest at 7 per cent. from the 20th day of December, making a total amount of \$37.35.

If the defendant in error remits the sum of \$39.85, the judgment of the district court will be affirmed. Failing to do so, the cause will be reversed and remanded for a new trial.

PER CURIAM. For the reasons stated in the foregoing opinion, if the defendant in error remits the sum of \$39.85 within 30 days, the judgment of the district court is affirmed. Failing to do so, the cause is reversed and remanded for a new trial.

(D) Notice of Special Circumstances

HARPER FURNITURE CO. v. SOUTHERN EXPRESS CO.

(Supreme Court of North Carolina, 1908. 148 N. C. 87, 62 S. E. 145, 30 L. R. A. (N. S.) 483, 128 Am. St. Rep. 588.)

This was an action by the Harper Furniture Company against the Southern Express Company to recover damages for delay in the shipment of an engine shaft. The evidence showed that plaintiff was engaged in the manufacture of furniture, having their mill at Lenoir, N. C.; that on or about the 21st of October, 1905, the Erie City Iron Works of Erie City, Pa., shipped to plaintiff, at Lenoir, N. C., an engine shaft weighing something like 650 pounds; that, pursuant to the order of plaintiff, the shipment was made by express over a line of connecting carriers, between the two points, including the defendant, and the shaft was delivered at Lenoir, N. C., by defendant company on November 9, 1905, indicating a wrongful delay in the shipment of something like two weeks. There was further evidence tending to show that the furniture factory for which the engine shaft had been ordered, was necessarily closed down during the time of wrongful delay, and that by reason of this loss of time in operating the factory the plaintiff company suffered damages to the amount of \$200 and more, arising from wages paid idle hands and other costs incident to the delay, and interest on the amount of capital invested in the mill and

unproductive during said time. It was further shown that, as soon as it was disclosed that the shipment was delayed, plaintiff company immediately duplicated the order, and both shafts were delivered at the same time, November 9th. Plaintiff offered to show the amount of profit which the mill could have realized during the time of delay, but the evidence was held to be incompetent. At the close of the testimony, the court intimated an opinion that on the evidence, only nominal damages could be recovered, and, in deference to this intimation, plaintiff submitted to a nonsuit and appealed.

HOKR, J.¹⁹ * * * The decisions of this state are to the effect that the current profits of a going manufacturing enterprise, which are dependent on the varying cost of labor and material and the fluctuations of the market value of the product, as a general rule, are too uncertain to form the basis of an award of damages in breaches of contract affecting the operation of the plant, and the better rule in such cases, when it appears that substantial damages are recoverable, is that such damages shall be ascertained on the basis of interest on the capital invested, which is unproductive for the time, with the addition, under certain circumstances, of the pay of hands idle and necessarily unemployed, and some other incidental expenses reasonably referable to the defendant's wrong, which may at times include an outlay in the reasonable effort to reduce or minimize the loss. * * * The judge below therefore made a correct ruling in rejecting the evidence offered tending to show the current profits of the plaintiff's mill. *Lumber Co. v. Iron Works*, 130 N. C. 584, 41 S. E. 797; *Sharpe v. Railroad*, 130 N. C. 613, 41 S. E. 799; *Rocky Mount Mills v. Railroad*, 119 N. C. 693, 25 S. E. 854, 56 Am. St. Rep. 682; *Foard v. Railroad*, 53 N. C. 235, 78 Am. Dec. 277; *Boyle v. Reeder*, 23 N. C. 607.

We are of opinion, however, that there was error in holding that, on the facts appearing from the evidence, the plaintiff could, in any event, recover only nominal damages. The plaintiff complains and offers evidence tending to show a breach of contract of carriage, and, as in other cases of breach of contract, it should ordinarily be allowed to recover the damages naturally incident to the breach, and which may be reasonably supposed to have been in the mind of the parties at the time the contract was made. Where the goods shipped have a market value, and there is nothing to indicate the specific purpose for which they were ordered, these damages are usually the difference in the market value of the goods at the time fixed for delivery and that when they were in fact delivered. * * * When, however, the goods are ordered for a special purpose, or for present use, in a given way, and these facts are known to the carrier, he is responsible for the dam-

¹⁹ Part of the opinion is omitted and the statement of facts is rewritten.

ages fairly attributable to the delay and in reference to the purpose or the use indicated, and it is not necessary always that those facts should be mentioned in the negotiations, or in express terms made a part of the contract; but, when they are known to the carrier, under such circumstances, or they are of such a character that the parties may be fairly supposed to have them in contemplation in making the contract, such special facts become relevant in determining the question of damages. Moore on Carriers, p. 425; Hutchinson on Carriers, § 1367.

In the citation from Hutchinson, after stating the general rule to be the difference in the market value of the goods, the author says: "But there may be circumstances under which the application of this rule would be inequitable. There may be, and frequently are, cases in which for special reasons the shipper may desire that the transportation of his goods may be hastened, and if, with a knowledge of these circumstances, the carrier should unreasonably delay the carriage, or if, having expressly contracted to carry them within a given time, or for a given purpose, he should negligently delay them beyond that time, or so as to defeat that purpose, the difference in the value of the goods at the time of their actual arrival and at the time when they should have been delivered may prove a very inadequate recompense to their owner." * * *

This limitation on the general rule as to the amount of damages recoverable for wrongful delay in the shipment of goods, and being itself an application of the third rule laid down in the case of *Hadley v. Baxendale*, Woods, Mayne on Damages, p. 21, is frequently presented in cases involving the making and shipments of machinery. In fact, these are the cases which usually call for the application of the principle stated. * * *

The plaintiffs were a firm engaged in the manufacture and sale of furniture. Of this the title of the firm, consignee in the bill of lading, taken in connection with the character of the implement ordered and shipped, would give reasonable notice. In this day and time, certainly it is a matter of common knowledge that an engine shaft is the part by which the power of the engine is applied to the operating machinery. That it is essential and necessary for the purpose, and without it the engine itself and the machinery dependent upon it are for the time out of action. The kind and size, and weight of the shaft, would give notice of at least the maximum capacity of the engine. As we said on the former appeal of this cause: "We may safely assume that the express companies are agencies organized for the purpose, at a higher price, of providing greater security and dispatch in the delivery of freight." And it would assuredly occur to any and every one that a shaft consisting of a piece of metal weighing not less than 650 pounds, which under ordinary circumstances could

and would be shipped with perfect safety and at a much lower charge by railway, would not have been shipped in this unusual way and at a much higher price, unless the call was urgent, and some unusual result would follow by reason of delay. The facts, we think, were such as to give clear indication that the shaft was designed for present use in the mill, and that some injury of the kind alleged would likely follow from breach of the contract of shipment, and require that the amount of plaintiffs' damages should be considered and determined by the jury in that aspect of the matter. * * *

As we have endeavored to show in the case before us, the style and title of the plaintiff firm, taken in connection with the nature and description of the implement ordered, together with the unusual mode by which the shipment was provided for, and the nature of defendant's business by which they undertook for a greater wage to give additional assurance both of safety and dispatch, all give notice that damages beyond the ordinary amount might be reasonably expected in case there was delay in breach of defendant's contract. * * *

We are not inadvertent to the fact that in the case of *Hadley v. Baxendale*, itself, the implement was the crank shaft of an engine, for lack of which the plaintiff's mill was stopped for the time. Without adverting to the distinctions that could be suggested between the two cases, it may be observed that this great case is important rather as laying down the general principles by which damages for breach of contract may be correctly ascertained, than as a decision on the facts of the particular case. In evidence of this, it may be noted that, as a matter of fact, the proof showed that defendant's clerk was notified that plaintiff's mill would be stopped while the shaft was being repaired. Just why this fact was ignored in the opinion of the judges does not appear, possibly because the notice referred to was given the day before the shaft was delivered for shipment—not, it seems, a very satisfactory explanation. While this does not at all impair the value of the case as making notable declaration of the general rules applicable to such causes, it does, perhaps, weaken it to some extent as a decision on any given state of facts.

In any event, we are of opinion that, on the facts presented here, the case comes within the third rule of *Hadley v. Baxendale*: "That where the special circumstances are known, or have been communicated, to the person who breaks the contract, and where the damages complained of flow naturally from the breach of contract, under those special circumstances, then such special damages must be supposed to have been contemplated by the parties to the contract and are recoverable." * * * Judgment below reversed, and new trial awarded.²⁰

²⁰ For former report of this case, see 144 N. C. 639, 57 S. E. 458 (1907).

ILLINOIS CENT. R. CO. v. JOHNSON & FLEMING.

(Supreme Court of Tennessee, 1906. 116 Tenn. 624, 94 S. W. 600.)

BEARD, C. J.²¹ The defendant in error had a contract to bore a deep well at Blytheville, in the state of Arkansas, and having a part of the apparatus, used in doing such work in Grenada, Miss., on the 23d of September, 1903, at that point delivered to the Illinois Central Railroad Company, for shipment to Memphis, Tenn., this property which was consigned to their own order. On the 2d of October, 1903, they were notified by their agents of the railroad at Memphis, of the arrival of the car containing this shipment, and that upon the payment of the freight the same was subject to removal. Upon receiving this notice, the defendants in error paid the freight that was due and demanded a delivery of their property. A diligent search was at once instituted for it, but it was not found within the yards of the company. Repeated, but fruitless, efforts were made for several days in succession to locate the car containing this property. Believing the property lost beyond recovery, the defendants in error went into the open market and supplied its place by the purchase of new material at a cost of about \$655. This new material was shipped to Blytheville, to be used in conjunction with so much of the outfit as was already there in carrying out the contract which the defendants had for the boring of the well, but the parties with whom they had contracted declined to permit them to go on with the work, upon the ground that the time had already passed when by the terms of the contract the well was to be completed. The outfit shipped from Grenada was located by the railroad company on or about the 1st of November, 1903, and a delivery thereof was then tendered to the defendants in error. The tender was declined, and thereupon the present suit was instituted to recover the damages which the shippers alleged they sustained from the unreasonable detention of this property. * * *

Upon proper pleas this case went to the jury, which returned a verdict as follows: "We, the jury, find damages for the plaintiff of \$880, for rental of equipment, and \$166 additional cost of pipe, etc., with interest at 6 per cent. from October 2, 1903, to June 19, 1905." Both parties were dissatisfied with this verdict, and made motions for a new trial, which were overruled by the trial judge, who thereupon entered up a judgment in accordance with its terms. Both parties have prosecuted the case to this court, and have assigned errors upon the action of the trial judge.

It is unnecessary to set out the several assignments of error, as it is conceded by the respective counsel that all, save one, are resolvable into the single question, What is the proper measure

²¹ Part of the opinion is omitted.

of damages in this case?—it being conceded by the plaintiff in error that for its failure to deliver in a reasonable time the defendants in error are entitled at least to recover nominal damages.

It was insisted in the lower court, and the insistence is repeated here, that under the evidence adduced, and upon the rule of law invoked by the defendants in error, they were entitled to recover all the special damages claimed in their declaration. It is conceded by their counsel, at least by implication, that their right to a recovery of these damages is conditioned upon notice having been brought home to the railroad that a breach of its contract for prompt delivery would result in a loss to them such as is here sued for. The evidence upon which they rely as showing the existence of such notice is found in the testimony of Mendenhall, who, as the agent of Johnson & Fleming, delivered this outfit to the railroad company at Grenada for shipment. He testified that, when he made the delivery, he said to the agent of the company that the defendants in error needed the pipe (constituting a part of this outfit) very badly, that they were putting in another well at some place in Arkansas, and they wanted to ship this pipe in a boat. * * *

The rule which the plaintiffs below invoke, and upon which they rely in this court, is that announced in *Hadley v. Baxendale*, 9 Ex. 341. This rule has been so frequently quoted and applied in the opinions of this court that it is unnecessary to set it out literally here. It is sufficient to say that under this rule a party who sues for a breach of contract is entitled to recover damages which result from that breach according to the usual course of things, or such as may be reasonably supposed to have been in the contemplation of both parties at the time the contract was made as the probable breach of it. Under the latter branch of the rule it has been universally held that in order to recover special damages, such as are claimed by the defendants in error in this case, the party against whom recovery is sought must have had such notice as would give him to understand that a breach of the contract would probably result to the other party in these special damages. In *Machine Company v. Compress Company*, 105 Tenn. 187, 58 S. W. 270, where this rule was enforced, it was insisted by the plaintiff in error, against whom it was applied, that granting the authority of the rule, yet that was not a proper case for its application, because the plaintiff in error was not sufficiently put on notice of the extraordinary damages it might incur from a breach of the contract. To this the court made reply: "No case holds, in order to put this rule in operation, that the party invoking it must have said to the other party at the moment of making the contract he would claim these damages for a breach, but it may be conceded the knowledge must be brought home to the party sought

to be charged under such circumstances, that he must know that the person he contracts with naturally believes that he accepts the contract with a special condition attached, * * * or, as is said by Mr. Sedgewick, 'notice must be more than knowledge on the defendant's part of the special circumstances. It must be of such a nature that the contract was, to some extent, based upon the special circumstances.' " * * *

In view of the rule and of the many illustrations of it to be found in the various cases which we have had occasion to examine, we are satisfied that it cannot be said that it was within the contemplation of these parties at the time of the delivery of this outfit for shipment at Grenada that a breach of the contract of prompt delivery would visit upon the carrier the heavy special damages which are claimed in this lawsuit. If the witness Mendenhall is correct when he undertakes to give the precise or exact statement which he made to the agent of the railroad when this outfit was shipped—that this was needed very badly—then, as a matter of course, such statement gave no notice whatever to the carrier that there was a time contract made by Johnson & Fleming for the boring of a well at Blytheville, or any other contract which would be disappointed by a failure of prompt delivery of this material. But, referring to the testimony of the witness in another place, where he says he told the agent of the railroad that the parties were needing the pipe very badly, that they were putting in another well some place in Arkansas, no more, do we think, was the carrier put on notice. By this statement the carrier was not made to understand that these consignees, Johnson & Fleming, had a contract for the boring of a well in Arkansas which would be forfeited in the event of a failure to promptly deliver. In fact, the railroad was not given to understand by this statement that these parties were boring a well for other persons than themselves. Upon such a loose and indefinite statement made to the carrier, it would seem, upon all the authorities, that for the breach of the contract upon his part the shipper would be debarred from a recovery of special damages, and would be compelled to content himself with such as would naturally flow from a breach. But it is insisted that whatever may be the defect as to notice at the time of delivery, yet the railroad authorities were notified distinctly at Memphis, while the search was being made for this lost outfit, that these parties did have a time contract for the boring of a well in Arkansas, and that this material was essential to the doing of the work, and that the delay in its delivery would likely result in the cancellation of the contract and the heavy damage for which they now seek a recovery. We think the law is otherwise. Notice to the carrier, after goods have been shipped, of circumstances which render special damages a probable consequence of delay, does not affect the original contract so as to render the carrier lia-

ble for such damages, although the subsequent delay is unreasonable. *Bradley v. Chicago, etc., R. R. Co.*, 94 Wis. 44, 68 N. W. 410; *Missouri, etc., R. Co. v. Belcher*, 89 Tex. 428, 35 S. W. 6; *Hooks Smelting Co. v. Planters' Compress Co.*, 72 Ark. 275, 79 S. W. 1052. * * *

But it is said by the same counsel that the nature of this shipment was of itself equivalent to notice. We are unable to see how the mere delivery of iron piping, etc., would have suggested in the remotest degree to the agent of the railroad the existence of a contract for the boring of a well. * * * The judgment of the lower court is reversed and the cause is remanded.²²

PATTERSON v. ILLINOIS CENT. R. CO.

(Court of Appeals of Kentucky, 1906. 123 Ky. 783, 97 S. W. 426.)

HOBSON, C. J. Appellant Patterson, on November 1, 1904, caused to be delivered to the Illinois Central Railroad Company at Helena, Ark., a car load of cotton seed meal and hulls consigned to him at Hodgenville, Ky. The car load was not delivered at Hodgenville until the 24th of November, and he filed this suit to recover damages. He alleged in his petition that a reasonable time for the delivery was not more than 6 days, or not later than November 7th; that on or about November 4th, and at divers other times before the car load of provender was finally delivered, he called at the depot of the defendant at Hodgenville to receive it, and, learning that it had not arrived, he notified the defendant that the car load of cotton seed meal and hulls was to be used by him in feeding a large number of cattle which he then had on hand and was feeding on cotton seed meal and hulls; that his supply of such feed was almost exhausted; that he could not supply himself elsewhere, and his cattle could not be changed to other feed without great loss and he would be greatly damaged by further delay in the delivery of the feed; that the defendant upon receiving this notice undertook to trace the car load of feed and have it delivered to him in a reasonable time thereafter; that a reasonable time after the notice was given was not more than 6 days, and the freight should have been traced and delivered not later than November 13th, but that by gross negligence in tracing and delivering the car it was not delivered until 11 days later, whereby he was deprived of the proper feed for his cattle for a period of 11 days; that thereby he sustained great loss in the weight of his cattle and

²²Accord: *Towles v. Atlantic Coast Line R. Co.*, 83 S. C. 501, 65 S. E. 638 (1909); *Tillinghast Styles Co. v. Providence Cotton Mills*, 143 N. C. 263, 55 S. E. 621 (1906); *Crutcher v. Choctaw, S. & G. R. Co.*, 74 Ark. 358, 85 S. W. 770 (1905).

in extra work and labor in attempting to care for them and secure proper feed for them during this time, amounting in all to the sum of \$220, for which he prayed judgment. The circuit court sustained a demurrer to his petition, and he appeals.

The general rule is that, where a contract has been broken, the damages which may be recovered for the breach are such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of the breach of it. It will be observed that the damages which the plaintiff sought to recover are wholly special damages, growing out of the fact that he was feeding a lot of cattle on cotton seed meal and hulls, that the cattle would not eat other feed without loss, and that the delay in getting the cotton seed meal entailed upon him extra labor, expense, and loss in his cattle. This special loss was due to the peculiar circumstances of the plaintiff, and the rule is that, unless such special circumstances are brought home to the other contracting party at the time the contract is made, there can be no recovery of such damages because they cannot reasonably be supposed to have been in contemplation of both parties at the time they made the contract.

Appellant's counsel concedes the general rule to be as stated, but it is insisted that after he gave notice on November 4th of the peculiar circumstances in which he was placed, and the defendant then agreed to trace the stuff and deliver it as soon as it could, it became liable for the special damages sustained after a reasonable time for the delivery, counted from the date of that notice. But it is not averred that any new contract was made between the parties on November 4th. No new consideration is averred, and, from the allegations of the petition, it cannot be inferred that a new contract was made then. If one party could by a subsequent notice make the other party liable for such special damages, then the rights of the parties would not be determined by the contract between them or by their situation at that time, but by the act of one of the parties alone. The rule that the notice should be given at the time the contract is entered into rests upon the ground that the person to whom the notice is given may have an opportunity to protect himself by the contract which he makes or by special precautions to avoid loss. A notice given afterwards by one party would afford the other party no such opportunity for self-protection. Accordingly, it is held that a notice to the carrier subsequent to the contract and after the goods have been shipped will not make him liable for special damages in cases of this sort. *M., K. & T. Ry. Co. v. Belcher*, 89 Tex. 428, 35 S. W. 6; *Crutcher v. Choctaw, etc., R. R. Co.*, 74 Ark. 358, 35 S. W. 770; *Bradley v. C., M. & St. P. R. R. Co.*, 94 Wis. 44, 68 N. W. 410, and cases cited.

There was no allegation of a depreciation, or of any injury to the property by the delay. The recovery was sought solely upon

the special damages growing out of the loss in the cattle, and, this not being recoverable, the circuit court properly sustained the demurrer to the petition. Judgment affirmed.²³

III. Avoidable Consequences²⁴

LAWRENCE et al. v. PORTER et al.

(Circuit Court of Appeals of United States, 1894. 63 Fed. 62, 11 C. C. A. 27, 26 L. R. A. 167.)

Before TAFT and LURTON, JJ.

LURTON, J.²⁵ * * * This is an action for breach of a contract of sale brought by the buyers against the sellers for failure to deliver a large quantity of lumber according to the terms of the agreement. The lumber was to be delivered by the defendants at their mill, on vessels to be furnished by the plaintiffs, during the shipping season of 1890. As each cargo was received, the buyer was to give acceptances, payable in 90 days. After the delivery of one cargo, the defendants refused, for no sufficient reason, to deliver the remainder upon the terms of the bargain, but offered to supply the lumber needed to complete the bill at a reduction of 50 cents on each 1,000 feet, for cash on delivery over the rail of plaintiffs' vessels and at the time when delivery was required by the broken agreement. The buyers stood upon their contract, and demanded delivery upon the credit therein stipulated, and refused to take the lumber offered by the delinquent sellers on any other terms than those contained in the agreement. There was evidence tending to show that the quantity and quality of lumber contracted for, and of the dimensions designated, could not be procured at the place of delivery from others than the defendants, or at any other available market in time for shipment according to the terms of the contract; that the lumber was intended for resale at Tonawanda, N. Y.; that defendants were so informed; and that the market value of such lumber at Tonawanda, after deducting freight and hauling, was considerably above the contract price. * * *

The ground upon which the defendants refused to carry out the sale was ostensibly their unwillingness to extend to the plaintiffs

²³As to the time when notice must be given see, also, Illinois Cent. R. Co. v. Johnson & Fleming, ante, p. 57.

²⁴For discussion of principles, see Hale on Damages (2d Ed.) § 30.

²⁵Part of the opinion is omitted.

the credit of 90 days provided for in the agreement of sale. They have not endeavored to show that there were any circumstances which justified this breach of the agreement. Credit is often a material element in a contract of sale, whereby the buyer is enabled to operate upon the capital of the seller. Credit extended without interest is, in effect, a sale at the stipulated price less the interest for the period of credit. The damage for a breach of contract to pay money at a particular date is the lawful rate of interest for the period of default, unless some other penalty is imposed by the agreement. So it would seem that if the buyer, in order to supply himself with the articles which the seller was obligated to sell, is compelled to buy from another, and to pay cash, one element of recovery for the breach would be interest upon his purchase for the period of credit. It is the well-settled duty of the buyer, when the seller refuses to deliver the goods contracted for, to do nothing to aggravate his injury. Indeed, he must do all that he reasonably can to mitigate the loss. If the buyer could have supplied himself with goods of like kind, at the place of delivery or other available market, at the time the contract was broken, and neglected to do so, whereby he suffered special damages by reason of the breach, he will not be suffered to recompense himself for such special damage, for the reason that to that extent he has needlessly aggravated the loss. The contention of the plaintiffs is that they could not supply themselves at the time the contract was broken with lumber of the qualities and sizes mentioned in their contract either at the place of delivery or at any other available market; that they were not required to buy from the defendants, who were already in default; that to have bought from them would operate both to encourage breaches of contracts, and would have been a waiver of all other right of recovery for the breach of their agreement; that to have accepted the proposal of the defendants to supply them for cash at the reduced price would simply have been to substitute one contract for another, thereby enabling defendants to escape all liability for a deliberate and indefensible violation of the bargain. They therefore insist that the measure of damage was the difference between the contract price and the market value at Tonawanda, N. Y., less freights to that point; the evidence showing that the lumber was bought for resale at Tonawanda, and that defendants were informed of that purpose.

For a breach of contract of sale, the law imposes no damages by way of punishment. The innocent party is simply entitled to recover his real loss. If the market value is less than the contract price, the buyer has sustained no loss. This is axiomatic, and needs no citation of authority. If the plaintiffs could have bought at East Jordan, or at any other convenient and available market, at the time of the breach, lumber of like kinds, at the same price or a

less price, it would be clear that they would have sustained no general damages. If they refused to avail themselves of such opportunity, and thereby sustained special and unusual loss, by reason of not having lumber of the kinds called for by the contract, or by being deprived of a profit resulting from a resale at Tonawanda, they could not recover such special damage, for such damage might have been avoided by replacing the undelivered lumber by other of like kinds. The fact that they could only buy from the defendants does not affect the duty of plaintiffs to minimize their loss as far as they reasonably could. The offer to sell for cash at a reduced price more than equalized the interest for 90 days, which was the value of credit. There seems to be no insurmountable objection in thus permitting a delinquent contractor to minimize his loss. The obligation on the buyer to mitigate his loss, by reason of the seller's refusal to carry out such a sale, is not relaxed because the delinquent seller affords the only opportunity for such reduction of the buyer's damage. *Warren v. Stoddart*, 105 U. S. 224, 26 L. Ed. 1117; *Deere v. Lewis*, 51 Ill. 254. * * *

The opinion in *Warren v. Stoddart* rests upon the theory that the buyer does not surrender or yield any right of action he may have for the breach of contract. It rests wholly upon the duty of mitigating the loss by replacing the goods by others, if they are obtainable by reasonable exertion. If this duty be such as to require him to buy from the delinquent seller, if the article can be obtained only from him, or because he offers it cheaper than it can be obtained from others, such a purchase from the seller is not the abandonment of the original contract by the substitution of another, nor would the purchase operate to the seller's advantage, save in so far as the damage resulting from his bad faith was thereby reduced. If the seller offers to sell for cash at a reduced price, or to sell for a less price than the market price, though in excess of the contract price, with the condition that it should operate as a waiver of the original contract, or of any right of action for its breach, then the buyer would not be obligated to treat with the seller, nor would the seller's offer, if rejected, operate as a reduction of damages. * * *

The cases of *Havemeyer v. Cunningham*, 35 Barb. (N. Y.) 515, and *Manufacturing Co. v. Randall*, 62 Iowa, 244, 17 N. W. 507, have been cited as sustaining a different result. The first case rested upon a state of facts very unlike those here involved. The other seems to have gone off upon the apprehension that, if the buyer supplied himself by a purchase from the delinquent seller, he thereby abandoned his contract, and substituted a new agreement in place of the broken bargain. That apprehension seems unjustified. But, however that may be, the case of *Warren v. Stoddart* is controlling. The offer after the breach by the defendants to sell the lumber necessary to complete the contract was

not coupled with any condition operating as an abandonment of the contract, nor as a waiver of any right of action for damages for the breach. * * *

ILLINOIS CENT. R. CO. v. COBB, CHRISTY & CO.

(Supreme Court of Illinois, 1872. 64 Ill. 128.)

Cobb, Christy & Co. during the winter of 1864-65 were engaged in furnishing corn at Cairo for the use of the army under a contract with the government. They had made large purchases of corn along the line of the Illinois Central Railroad Company through one Fallis, who drew on them for the cost of the corn as soon as he shipped it, at the same time forwarding the bill of lading. This action is brought to recover damages by reason of the failure of the railroad company to deliver such corn in a reasonable time at Cairo, whereby the plaintiffs lost the opportunity of delivering the same under their contract.

LAWRENCE, C. J.²⁶ * * * It is also urged that the plaintiffs should have gone into the market at Cairo and have bought corn to fill their contract, and that, not having done so, they can only recover the market price. However this might be, if they had not already invested their money in the corn in controversy, we cannot so hold in the present case. It would be very unreasonable to require one, who has bought and paid for an article, to have the money in his pocket with which to buy a second, in case of non-delivery of the first. This demand comes with an ill grace from a party by whose fault there has been a failure of delivery. * * *

CHICAGO CITY RY. CO. v. SAXBY.

(Supreme Court of Illinois, 1904. 213 Ill. 274, 72 N. E. 755, 68 L. R. A. 164, 104 Am. St. Rep. 218.)

This was an action on the case, brought by Mary Saxby against the Chicago City Railway Company for damages for personal injuries. The jury returned a verdict in favor of plaintiff for \$16,000, and on her remitting \$6,000 of that amount a new trial was denied and judgment entered for \$10,000. This judgment having been affirmed by the Appellate Court for the First District, defendant appeals.

HAND, J.²⁶ * * * On the evening of August 16, 1899, appellee was a passenger upon one of appellant's cars going south

²⁶ Part of the opinion is omitted and the statement of facts is rewritten.

upon Indiana avenue, in the city of Chicago. The evidence introduced on her behalf tended to show: That as the car approached Forty-Fifth street she signaled the conductor to stop the car at that street. That the car stopped at the intersection of Indiana avenue and Forty-Fifth street. That she started to leave the car, but, before she had time to alight upon the ground, and while she stood upon the running board upon the west side of the car, the car was suddenly started without warning to her, and she was violently thrown from the car upon the street, where she struck upon her left side and was injured. At the time of the accident the appellee was 60 years of age, and was in good health. From the time of the injury to the date of the trial, which occurred more than two years after the accident, she had left her room but once, and at the time of the trial was unable to sit up but a portion of the time or to walk. That the injury was to her left leg. That the neck of the femur bone of that leg was fractured, and tuberculosis had developed in the left knee, and the knee joint of that leg had become ankylosed.

The main contention of the appellant is that the diseased condition of the knee was caused by the leg being improperly treated by the physicians employed by the appellee, by placing thereon splints and plaster casts, and attaching to the foot pulleys and weights, and that tuberculosis, which, it is claimed, was organic with her, by reason of such imperfect treatment was developed in the knee; and it is urged that by reason of those facts the diseased condition of the knee was not the natural and ordinary consequence of the injury received by appellee at the time she fell upon the street, and that she ought not to be permitted to recover damages from the appellant for the conditions which were shown to exist in the knee. The appellee, immediately after the injury, was carried to her apartment and was treated by Drs. Freund and Farnum, and Drs. Fenger and Andrews were called in consultation—Dr. Freund was called within a few minutes after the accident—all of whom were physicians practicing their profession in the city of Chicago. She was also cared for by a trained nurse during the first 18 months succeeding her injury, and at the time of the trial had in her employ a young woman who had devoted her entire time to her care since the trained nurse left her employ. Drs. Halstead and Findley, also physicians in practice in the city of Chicago, were called as experts, and approved the treatment applied to the appellee by her attending physicians.

It was the duty of the appellee to use reasonable care to effect a speedy and complete cure of the injury which she sustained by being thrown upon the street from appellant's car, and, to that end, she was required to exercise reasonable care to employ physicians of ordinary skill and experience to treat her, and other means to effect a cure of her injuries. She was not, however, required to

employ the highest medical skill which might be found. All the law required was that she exercise such prudence as men and women of ordinary judgment, under like circumstances, would exercise in the choice of physicians and the means to be used to effect a recovery. She was not an insurer, bound to act at her peril; and if she exercised reasonable care in selecting her physicians, and in the employ of other means for her recovery, if her physicians made a mistake in the treatment applied by them to her, or the means employed failed to effect a cure, then she may recover for the entire injury which she has sustained, as the law, if the injured person uses ordinary care in selecting a physician, and in the employment of other means to effect a cure, regards an injury resulting from the mistake of a physician, or from a failure of the means employed to effect a cure, as a part of the immediate and direct damages which naturally flow from the injury. * * * Judgment affirmed.

ELLIS v. HILTON.

(Supreme Court of Michigan, 1889. 78 Mich. 150, 43 N. W. 1048, 6 L. R. A. 454, 18 Am. St. Rep. 438.)

LONG, J.²⁸ This is an action to recover damages against the defendant for negligently placing a stake in a public street in Traverse City, which plaintiff's horse ran against, and was injured. It was conceded on the trial by counsel for defendant that the horse of plaintiff was so injured that it was entirely worthless. Plaintiff claimed damages, not only for the full value of the horse, but also for what he expended in attempting to effect a cure, and on the trial his counsel stated to the court that plaintiff was entitled to recover a reasonable expense in trying to cure the horse before it was decided that she was actually worthless. The court ruled, however, that the damages could not exceed the value of the animal. A claim is made by the declaration for moneys expended in trying to effect a cure of the horse after the injury. Upon the trial the plaintiff testified that he put the horse, after the injury, into the hands of a veterinary, and paid him \$35 for cure and treatment. On his cross-examination, he also testified that the veterinary said "there was hopes of curing her, if the muscles were not too badly bruised. He didn't say he could cure her. He thought there was a chance that he might."

Dr. De Cow, the veterinary, was called, and testified, as to the injury, that the stake entered the breast of the horse, on the left side, about six inches; that the muscles were bruised, and the left leg perfectly helpless. He got the wound healed, but on account of the severe bruise of the muscles the leg became paralyzed and

²⁸ Part of the opinion is omitted.

useless. On being asked whether he thought she could be helped when he first saw her, he stated that he did not know but she might; that she might be helped, and kept for breeding purposes, and be of some value.

It is evident from the testimony that the plaintiff acted in good faith in attempting the cure, and under the belief that the mare could be helped, and be of some value. The court below, however, seems to have based its ruling that no greater damages could be recovered than the value of the animal, and that these moneys expended in attempting a cure could not be recovered, upon the ground that the defendant was not consulted in relation to the matter of the attempted cure. Whatever damages the plaintiff sustained were occasioned by the negligent conduct of the defendant, and recovery in such cases is always permitted for such amount as shall compensate for the actual loss. If the horse had been killed outright the only loss would have been its actual value. The horse was seriously injured; but the plaintiff, acting in good faith, and in the belief that she might be helped and made of some value, expended this \$35 in care and medical treatment. He is the loser of the actual value of the horse, and what he in good faith thus expended. He is permitted to recover the value, but cut off from what he has paid out. This is not compensation.

Counsel for defendant contends that such damages cannot exceed the actual value of the property lost, because the loss or destruction is total. There may be cases holding to this rule; but it seems to me the rule is well stated, and based upon good reason, in *Watson v. Bridge*, 14 Me. 201, 31 Am. Dec. 49, in which the court says: "Plaintiff is entitled to a fair indemnity for his loss. He has lost the value of his horse, and also what he has expended in endeavoring to cure him. The jury having allowed this part of his claim, it must be understood that it was an expense prudently incurred, in the reasonable expectation that it would prove beneficial. It was incurred, not to aggravate, but to lessen the amount for which the defendants might be held liable. Had it proved successful, they would have had the benefit of it. As it turned out otherwise, it is but just, in our judgment, that they should sustain the loss." In *Murphy v. McGraw*, 74 Mich. 318, 41 N. W. 917, it appeared on the trial that the horse was worthless at the time of purchase by reason of a disease called "eczema." The court charged the jury that if the plaintiff was led by defendant to keep on trying to cure the horse the expense thereof would be chargeable to the defendant, as would also be the case if there were any circumstances, in the judgment of the jury, which rendered it reasonable that he should keep on trying as long as he did to effect the cure. The plaintiff recovered for such expense and on the hearing here the charge of the trial court was held correct.

It is a question, under the circumstances, for the jury to deter-

mine whether the plaintiff acted in good faith, and upon a reasonable belief that the horse could be cured, or made of some value, if properly taken care of; and the trial court was in error in withdrawing that part of the case from them. Such damages, of course, must always be confined within reasonable bounds, and no one would be justified, under any circumstances, in expending more than the animal was worth in attempting a cure. * * * Judgment reversed, and new trial ordered.

WESTERN REAL ESTATE TRUSTEES v. HUGHES.

(Circuit Court of Appeals, Eighth Circuit, 1909. 172 Fed. 206,
96 C. C. A. 658.)

In Error to the Circuit Court of the United States for the District of Nebraska.

Before SANBORN and VAN DEVANTER, Circuit Judges.

VAN DEVANTER, Circuit Judge.²⁹ This case arose out of the falling of a party wall in Omaha, whereby the buildings of which it is a part were carried down and much damage was done to the stock of groceries and store fixtures of the plaintiff below, who was occupying one of the buildings under a lease. * * * The other building was owned by the defendants below. * * * The plaintiff sought to recover from the defendants the amount of his loss, and in his petition alleged that * * * "the collapse of the said party wall, so as aforesaid caused and brought about by and through the negligence of the defendants and of their agents and employes, caused the collapse and fall of the * * * building * * * occupied by plaintiff." In their answer the defendants denied the negligence so charged against them, and alleged that the plaintiff negligently had contributed to the falling of the party wall (a) by permitting waste water from a large refrigerator in the building occupied by him to overflow against and into the party wall, whereby its stone foundation was weakened; (b) by storing in such building, near the party wall and above the part of the foundation which was so weakened, a large amount of merchandise, the weight of which was excessive considering the condition of the foundation; and (c) by failing to remove such merchandise or any part thereof on the evening preceding the falling of the party wall, after discovering the weakened condition of the foundation. In his reply the plaintiff denied the negligence so charged against him, and a trial of the issues resulted in a verdict and judgment in his favor, which the defendants now seek to avoid.
* * *

²⁹ Part of the opinion is omitted.

Quite apart from any negligent contribution by the plaintiff to the falling of the wall, and after correctly stating that one whose property is endangered through the negligence of another is required to exercise reasonable care to avoid or lessen the threatened injury, and can then charge the delinquent with the labor and expense properly incident thereto, the court instructed the jury that if the plaintiff by the exercise of reasonable care could have removed all or a part of his property from the building after discovering that the wall was in danger of falling, and he failed so to do, he could recover only such of the damages sustained as would not have been avoided by so doing. But the defendants insisted then, and still insist, that if the plaintiff negligently failed to lessen his damages he was without any right of recovery; that is, if he was negligent in failing to remove a part of his property from the building he could not recover at all, although he reasonably could not have avoided the injury to the remainder of his property. The law is not so unreasonable. On the contrary, as was indicated in the instruction given, the consequence which it attaches to a negligent failure to lessen damages is not the loss of all right of recovery, but the elimination from the recovery of such damages as could have been avoided by the injured party by the exercise of reasonable care. *Warren v. Stoddart*, 105 U. S. 224, 229, 26 L. Ed. 1117; *Douglass v. Stephens*, 18 Mo. 362; *Kansas Pac. Ry. v. Muhlman*, 17 Kan. 224, 234; 1 *Sutherland on Damages* (3d Ed.) § 88; 13 *Cyc.* 71 et seq. * * * The judgment is affirmed.³⁰

IV. The Required Certainty of Damages³¹

RICHMOND & D. R. CO. v. ALLISON.

(Supreme Court of Georgia, 1890. 86 Ga. 145, 12 S. E. 352, 11 L. R. A. 43.)

Allison sued the railway company for damages for personal injuries. In his declaration he set forth the nature and effect of the injuries, and also alleged that at the time he was injured he was a postal clerk, earning \$1,150 a year, with prospects for an immediate promotion to a salary of \$1,300 a year, and excellent prospects for promotion in his life beyond the highest wages paid to postal clerks, and that, when he was hurt, he was 22 years old. The jury found for plaintiff \$11,250.

³⁰ Rehearing denied October 15, 1909. For former report, see 153 Fed. 560, 82 C. C. A. 514 (1907).

³¹ For discussion of principles, see *Hale on Damages* (2d Ed.) § 31.

SIMMONS, J.³² Allison sued the railroad company for damages, and obtained a verdict. The railroad company moved for a new trial, upon several grounds. * * * The view we take of the case renders it unnecessary to discuss any of these grounds except the fifth and the ninth. The fifth is as follows: "Because the court erred in charging the jury as follows: 'Another item of damages alleged by the plaintiff is for permanent injuries. * * * No fixed rule exists for estimating this sort of damage. The plaintiff's age, his habits, his strength, sex, vocation, the rate of wages earned by him in the past by his labor, his prospects of obtaining steady, remunerative employment in the future, prospects of increased earnings in the future by additional experience and skill acquired, if there be evidence on this point, and that evidence, in your opinion, is definite and tangible, these circumstances, in so far as they may be illustrated by the evidence, are all circumstances proper to be taken into account.'"

The plaintiff in error objects to that portion of the charge set out which says, "No fixed rule exists for estimating this sort of damage," and insists that a fixed rule does exist, to-wit, that such a sum should be allowed the plaintiff as would make his future income the same as it would have been had he not been injured, taking into consideration the probabilities of disease, decreased capacity to labor, and the duration of life. It is insisted that the charge, as given, puts no limit upon the finding of the jury; that, while it calls to their attention elements which they could consider, it does not restrict them by the fixation of a principle which should control their conclusion. This court has considered this question upon different occasions, and in several cases has said that there is no "Procrustean rule," or fixed rule, in cases of this kind. See *Railway Co. v. Freeman*, 83 Ga. 586, 10 S. E. 277. * * * The last case in which the question was considered was *Railway Co. v. Freeman*, supra, where the exact words complained of were approved by this court.

Upon the request of counsel for the plaintiff in error, we allowed him to review that decision. We have carefully considered his argument, and have devoted much time to reading the text-books and reports of cases decided by other courts, to ascertain if we could find any authority or decision holding that there is a fixed rule to be given to the jury, which must control them in estimating the damages to a person who has been permanently injured by the carelessness and negligence of a railroad company, or natural person, but we have been unable to find a decision of any court, or a dictum of any text-writer, holding that there is a fixed rule for measuring the damages in such cases; and, in the nature of things, it is impossible for a court to prescribe any fixed rule, because it

³² Part of the opinion is omitted and the statement of facts is rewritten.

is impossible to prove such exact data as would authorize a court to prescribe one. It is impossible for any witness to testify to the exact time that the injured person would have lived, if he had not been injured. It is impossible to say whether the person would have remained in good health during his whole life, or whether he would have lost little or much time by sickness or idleness or the loss of an opportunity to labor. It is impossible to say whether he would have continued to earn the same amount of money during his whole life; whether he would have earned more, and how much more, or less, and how much less; whether he would have remained in the same occupation, or would have abandoned that, and pursued another more lucrative, or less so. Unless these and other facts which might be enumerated could be shown the jury, we do not see how a fixed rule to measure the damages for a permanent injury could be prescribed to the jury.

It may be said, however, that the life-tables put in evidence would show a man's expectancy of life, and that the amount he was earning at the time he was injured would be a sufficient basis upon which to prescribe such a rule; but we do not think that this would in all cases be fair, either to the plaintiff or to the railroad company. If the plaintiff were a young man of character and capacity and industry, and had chosen his occupation, and commenced its pursuit, his yearly income at first might be small, but, in a few years, he might be able to increase it very largely; yet, under the rule contended for, he would be confined during his life to the small income he was making at the commencement. On the other hand, if the plaintiff were an aged or a middle-aged person, making a large yearly income, it would be unfair to the railroad company to take that income and his expectancy of life as the sole basis to determine the amount of his recovery; because our experience shows that a man in declining years has not ordinarily the same capacity to labor and earn money as a young man. It is then that sickness, inability, and indisposition to labor come upon him more and more each year, as he grows older. These and like facts should then be taken into consideration by the jury in behalf of the railroad company. None of these things can be proved with such exactness as would authorize a court to prescribe a fixed rule. * * *

We therefore think that it is better for both parties to let the jury look at these things as a whole, in the light of common sense and their own experience, and let them make such a compensation in their verdict as would be reasonable and just to both parties, not giving to the plaintiff a large sum with the purpose of enriching him, but compensating him for the loss of money which he would probably earn had he not been injured, and thereby prevented by the negligence of the defendant. These remarks, of course, apply only to the measure of damages for the permanent

injury. It is not contended that any fixed rule can be prescribed as a measure of damages for pain and suffering. We therefore reaffirm the ruling in *Railroad Co. v. Freeman*, supra. * * *

The ninth ground complains that the court erred in admitting the following evidence, over the objection of counsel for the defendant, to-wit: "Question. How soon after his injury [referring to Mr. Allison] were there any vacancies to which promotions could have taken place? Answer. Vacancies were shortly afterwards; say certainly in the course of the next three to six months, I think, after Allison was hurt. According to Mr. Allison's standing, and the classification which I give, his prospects for promotion to one of these places was good." The defendant objected to this testimony, and all other evidence of the witness, tending to show prospects of promotion, as being simply the opinion of the witness, and showing a possibility too remote to be the basis of consideration by the jury in finding damages.

We think this exception is well taken and that the court erred in allowing the testimony complained of to go to the jury. The testimony of this witness shows, in substance, that he was the assistant superintendent of the railway mail service of the fourth division; that Allison was a postal clerk under him, and that he had special supervision of Allison's record and work; that the next class above Allison in the line of promotion at the time he was injured was "class 5," and that the salary in that class was \$1,300 a year; that Allison was receiving, when injured, \$1,150; that Allison's standing in regard to the basis of promotion was "first-class;" that there was no vacancy in the class above Allison at the time he was injured, but two vacancies occurred in the course of from three to six months thereafter; that there were three men of Allison's class, including Allison, and that the other two stood as well as he did, and both were older than Allison. One had been in the service longer and the other a shorter time than Allison. Political considerations enter somewhat into the appointment of clerks. The promoting power is at Washington; the office here is the recommending power. A vacancy in the class above Allison might be filled sometimes from other routes, and men taken from another route, and put in, who occupy, say, a second rank. It is in the power of the department under the rules to do that. There is no certainty at all, when there is a vacancy in a position of chief clerk (the clerk in charge), that one of a lower grade on the same route will go up; no more than in any other business. It is not guaranteed.

We think this evidence shows that Allison's promotion was too uncertain, and the possibility of an increase of his salary from \$1,150 to \$1,300 too remote, to go to the jury, and for them to base a verdict thereon. While it is proper in cases of this kind to prove the age, habits, health, occupation, expectation of life,

ability to labor, and probable increase or diminution of that ability with lapse of time, the rate of wages, etc., and then leave it to the jury to assess the damages, we think it improper to allow proof of a particular possibility, or even probability, of an increase of wages by appointment to a higher public office, especially where, as in this case, the appointment is somewhat controlled by political reasons. * * * To allow the jury to assess damages in behalf of the plaintiff, on the basis of a large income arising from a public office, which he has never received, and which is merely in expectancy, and might never be received, or, if received at all, might come to him at some remote and uncertain period, would be wrong, and unjust to the defendant. * * *

It will be observed that the testimony in this case shows that there were two others in the same class with Allison, equally competent and efficient as he was, and it is by no means certain that Allison would have been preferred to each of them, in case of vacancy, and promoted above them. So it could not be said that he was in the direct line of promotion. * * * This testimony being illegal, and having been objected to, and it being very probable, from the amount of the verdict, that the jury based their calculation upon the increased salary which Allison would have received if he had been promoted, we think it damaged the defendant, and we grant a new trial upon this ground. * * * Judgment reversed.

V. Same—Profits or Gains Prevented³³

SHERMAN CENTER TOWN CO. v. LEONARD.

(Supreme Court of Kansas, 1891. 46 Kan. 354, 26 Pac. 717,
26 Am. St. Rep. 101.)

Action by Thomas P. Leonard against the Sherman Center Town Company for damages for breach of contract. The defendant company, desiring to increase the influence and population of Sherman Center so as to make it the county seat, agreed with Leonard to move his hotel from Itasca to Sherman Center and to convey certain lots to him in return for his removal to that town. The plaintiff complains that defendant failed to move the hotel; that Sherman Center had become a flourishing town, where the hotel business would have been profitable; that he was now without business as Itasca had become depopulated. Over the objection of

³³ For discussion of principles, see Hale on Damages (2d Ed.) § 32.

the defendant, plaintiff was allowed to testify that the profits would have been \$150 a month and that the total damage sustained was from \$1,200 to \$1,500, besides the cost of moving the hotel. There was judgment for plaintiff for \$600.

JOHNSTON, J.³⁴ * * * The prospective profits that he lost by the breach of the contract are too remote, uncertain, and speculative to be recoverable. Who can tell what the future gains of the hotel business would have been in Sherman Center, if he had moved there? His past profits in Itasca were not shown, and there is no testimony of the gains of others established in the same business at Sherman Center. How, then, does Leonard know that the profits would have been \$150 per month? The gains to be derived from the business depended upon many contingencies other than the mere removal of his hotel to that place. The growth of the town; the location of the county-seat there or at another town near by; the immigration and travel; the competition in the hotel business; the price of provisions and the cost of help; the general reputation of the house; and the popularity of the landlord with the traveling public and the people of that community—are suggested as some of the considerations that would affect the anticipated benefits. Where the breach on a contract results in the loss of definite profits, which are ascertainable, and were within the contemplation of the contracting parties, they may generally be recovered; but the prospective profits do not furnish the correct measure of damages in the present case. Aside from the remote, conjectural, and speculative character of the anticipated benefits, it cannot be said that the loss of them is the direct and unavoidable consequence of the breach. The plaintiff could not sit idle an indefinite length of time and safely count on the recovery of \$150 per month as damages. If there was a breach of the contract, it was his duty, upon learning of it, to at once remove the building, or employ others to do so, and charge the cost of the removal to the town company. The law requires that the injured party shall do whatever he reasonably can and improve all reasonable opportunities to lessen the injury. From the testimony it appears that Leonard could have procured others to move the hotel; and in such a case the ordinary measure of damages is the cost of removal, and the reasonable expenses of avoiding the consequence of defendant's wrong. * * *

Counsel for plaintiff in error say that no more than the cost of removal was allowed by the court; but the admission of the objectionable evidence * * * would indicate that the court adopted an incorrect measure of damages, and did not limit the recovery to the expense of the removal. * * * For the error of the court in admitting testimony the judgment of the court below will be reversed and cause remanded for a new trial.

³⁴ Part of the opinion is omitted and the statement of facts is rewritten.

STATES et al. v. DURKIN et al.

(Supreme Court of Kansas, 1902. 65 Kan. 101, 68 Pac. 1091.)

Action by James Durkin and others against Christian States and others. There was judgment for plaintiffs, and defendants bring error.

GREENE, J.³⁵ The defendants in error entered into a partnership in April, 1897, to engage in the business of plumbers and steam fitters in the city of Topeka. It was necessary, in the successful prosecution of such business, to purchase plumbing goods and material. The plaintiffs in error were at the time members of what is called the Kansas Master Plumbers' Mutual Benefit Association, which it is alleged is an unlawful combination, organized for the purpose of carrying out restraint in trade and commerce, so far as it relates to the plumbing business in Kansas. The defendants in error brought this action on the 22d day of July, 1897, in the district court of Shawnee county, to recover damages alleged to have been sustained to their business by reason of this unlawful combination interfering and preventing them from purchasing plumbing goods and material on the market at the generally prevailing prices, and in preventing them from procuring such goods and material within a reasonable time; also to recover losses sustained on certain plumbing contracts, resulting from the wrongful acts of the plaintiffs in error. The jury found against plaintiffs below on the question of special damages, but found that they had sustained damages to their general business in the sum of \$300, and that the value of the services of their attorneys was \$200, for which amounts the court below rendered judgment. From this judgment the plaintiffs in error prosecute this proceeding. * * *

The important question is, does the evidence sustain the finding of the jury that the plaintiffs were entitled to recover for damages to their general business? When such damages are recoverable, they are confined to the loss of profits. In this state the loss of profits to a business which has been wrongfully interrupted by another is an element of damage for which a recovery may be had. But in all such cases it must be made to appear that the business which it is claimed has been interrupted was an established one; that is, it had been successfully conducted for such a length of time, and had such a trade established, that the profits thereof are reasonably ascertainable. *Brown v. Hadley*, 43 Kan. 267, 23 Pac. 492.

In the present case the plaintiffs had only been in business a short time—not long enough so that it can be said they had an established business. They had contracted three jobs of plumbing;

³⁵ Part of the opinion is omitted.

had finished two, and lost money on both—not, however, because of any misconduct or wrongful acts on the part of the defendants, or either of them. They carried no stock in trade, and their manner of doing business was to secure a contract, and then purchase the material necessary for its completion. It is not shown that they had any means or capital invested in the business, other than their tools. Neither of them had prior thereto managed or carried on a similar business. Nor is it shown that they were capable of managing this business so as to make it earn a profit. There was little of that class of business being done at that time, and little, if any, profit derived therefrom. The plaintiffs' business lacked duration, permanency, and recognition. It was an adventure, as distinguished from an established business. Its profits were speculative and remote, existing only in anticipation. The law, with all its vigor and energy in its effort to right wrongs and award damages for injuries sustained, may not therefor enter into the domain of speculation or conjecture.

In view of the character and condition of the plaintiffs' business, the jury had not sufficient evidence from which to ascertain profits. The finding of damages to the plaintiffs' business has no support in the evidence, and, since an attorney's fee can only follow an award of actual damages, the judgment of the court below is reversed, and the cause remanded. All the justices concurring.

NATIONAL FIBRE BOARD CO v. LEWISTON
& A. ELECTRIC LIGHT CO.

(Supreme Judicial Court of Maine, 1901. 95 Me. 318, 49 Atl. 1095.)

Action on the case by the National Fibre Board Company against the Lewiston & Auburn Electric Light Company to recover of defendant damages for flowage of plaintiff's wheels and machinery in its mill. Case submitted on report.

EMERY, J.³⁶ In the latter part of January, 1895, the plaintiff corporation began the erection of a water mill upon its own land and across a nonnavigable stream, the Little Androscoggin river, at Minot corner. At that time some three miles down the river, there were in existence another water mill and dam across the same river, which had been built in 1888, and were, in January, 1895, and thereafter, leased and operated by the defendant corporation.

* * *

Some three years afterwards, in July, 1898, the defendant put on top of the solid part of its dam, along its whole length, flash-

³⁶ Part of the opinion is omitted and the statement of facts is rewritten.

boards 24 inches high, and maintained them there up to the date of the writ, March 14, 1899, to increase its head of water. The plaintiff complains that these flashboards have caused the water to flow beyond its former flow, and upon the plaintiff's wheels, and have thereby materially lessened their efficiency. This action on the case is brought to recover damages for this increased flow caused by the flashboards; the plaintiff claiming that such increased flow is beyond the defendant's right. * * *

The defendant again contends that the net earnings or profits alleged to be lost are, not recoverable because too uncertain and speculative, and that the plaintiff is limited to the decrease in the rental value of its mill at Minot's Corner. If such profits are uncertain or speculative, they cannot be included in the assessment of damages. When, however, one has erected or acquired a valuable plant, with an established business connected therewith, yielding regular profits, and his plant is impeded in its efficient operation by the tortious act of another, so that his regular profits are thereby lessened, he cannot be made whole unless he is reimbursed for the lost earnings of his plant. His whole plant and his business combined may earn far more income under his management than the mere market rental value of some part, or even all, of the plant. His actual loss from the diminished efficiency of his plant, and the consequent diminished product, may be far more than the decrease in the market rental value. He is justly entitled to the profits which his sagacity, skill, and industry would bring him in the business if not interfered with. If he cannot recover from the wrongdoer this actual loss over and above the decrease in the rental value, he suffers a wrong, to the great reproach of the law.

The law, however, is not open to that reproach. In *White v. Moseley*, 8 Pick. (Mass.) 356, the defendant tore away part of the plaintiff's dam upon which was a mill, thereby lessening the efficiency of the mill. The plaintiff claimed and recovered not only the cost of restoring the dam, but also for the loss of profits through the interruption of his business. * * * In *Holden v. Manufacturing Co.*, 53 N. H. 552, the defendant tortiously lessened the water power of the plaintiff's cotton mill, thereby diminishing the efficiency of his machinery. It was adjudged that the plaintiff could recover for the consequent diminution of the net earnings or profits of his mill. In *Simmons v. Brown*, 5 R. I. 299, 73 Am. Dec. 79, the defendant, by raising his dam tortiously, caused the water to flow back upon the plaintiff's wheels in his cotton mill above. The defendant contended, there as here, that he was liable only for a fair and reasonable rent of the water power of which the plaintiff was deprived. The court held, however, that the plaintiff could recover for the loss of such profits as he might have made upon the goods he would have manufactured but for the defendant's act. * * *

We find no decisions of our own court in conflict with the above. In the cases in which a claim to recover for lost profits is denied, it will be found that the profits claimed were not reasonably certain to accrue, but were speculative, contingent, or otherwise uncertain, or merely probable. * * *

Recurring now to the evidence in the case, we find that the plaintiff had acquired its plant, and was doing a business in connection with it, viz. the manufacture of leather boards. The business appears to have become established, regular, and permanent. Its volume was such that the factory or mill was running on full time,—23 hours a day. There is no suggestion of any falling off in the demand for, or price of, the manufactured product. No breakage of machinery, no interruption of any kind, is shown except that caused by the flowage. The regular daily product of three beating engines, running for 23 hours each day, was one ton of manufactured leather board. There was a regular definite profit upon each ton manufactured. It seems reasonably certain that such production and consequent earnings or profits would have continued during the time covered by the writ; at least, no reason is shown for apprehending the contrary. So far, therefore, as the defendant crippled the engines, and reduced their profit-making power, it should itself make up that profit.

The application of the principle of recovery for lost profits is much more difficult than the exposition of the principle itself. Numerous circumstances must be considered. The factory did not run every day. The defendant apparently had the right to maintain flashboards of some width during some part of the time. Much of the time, also, the ice, the natural high stage of the water, and other obstructions, may have more or less flowed out the plaintiff's wheels. It was for the plaintiff to show us how much of the flowage in amount, time, and injury resulted directly from the defendant's use of flashboards in excess of right.

We wish, as was suggested by the justice presiding at the trial, the amount of damages might be assessed by a commission of experts, who could obtain full data, and make the proper discrimination between the rightful and wrongful flowage. The task, however, has been imposed upon us, and after careful consideration of the limited data laid before us, our minds rest upon the sum of \$800 as the most that is justified by the evidence in this case. Judgment for the plaintiff for \$800.

VI. Entirety of Demand³⁷

WICHITA & W. R. CO. v. BEEBE et al.

(Supreme Court of Kansas, 1888. 39 Kan. 465, 18 Pac. 502.)

HOLT, C.³⁸ This action was brought by defendants in error as plaintiffs, in Sedgwick district court, to recover damages to lands they had rented, by an overflow of water. In their petition they aver that in the spring of 1885 they were cultivating a tract of 40 acres off the south side of the S. E. $\frac{1}{4}$ of section 26, township 27 S., of range 1 W., Sedgwick county, and had fully prepared to plant corn upon it; that the said defendant railroad company had then recently diverted the water of a stream from its natural water-course in the construction of its roadbed, and discharged it through an artificial channel; that on or about the 15th of May of said year on account of heavy rains, a great quantity of water was discharged through this newly made channel upon the land in question; and the water, overflowing and remaining upon the same for about six weeks, prevented the plaintiffs from planting, cultivating, and growing corn and other crops thereon, and by reason thereof they have been damaged in the sum of \$500. It appears, further, that, on the 17th of August following, said plaintiffs commenced an action against this defendant to recover damages caused by the water flowing through the same channel at the same time, and overflowing 60 acres of corn already planted. This action was tried, and judgment rendered for plaintiffs for \$75. The defense urged, and properly raised and supported by the evidence, was that the judgment in the former action was a bar to this one. Defendant brings the case here for review. It appears that the plaintiff had rented 320 acres, half of said section 26, and that the 40 acres unplanted, for which damages are claimed in this action, was a part of this same tract, with the 60 acres which had been planted, and for which damages had been claimed and recovered heretofore. The defendant claims that the judgment obtained in the former action precluded the plaintiff from setting up any other and different damages than those claimed in that action, occasioned at the same time.

We believe the law to be well settled that no party is permitted to split his causes of action into different suits. If he does, and obtains judgment upon any part, such judgment is a complete bar to a recovery upon any remaining portion thereof. The splitting up of claims is not permitted in the case of contracts, and the same

³⁷ For discussion of principles, see Hale on Damages (2d Ed.) § 33.

³⁸ Part of the opinion is omitted.

rule which prevents a party from doing so applies with equal force to actions arising in tort, and the same act cannot be the foundation for another suit, although the items of damages may be different. In this action the act complained of was the discharge of the water upon the 15th day of May; and this claim for damages might have been litigated in the first action, and should have been set forth in the petition therein. If plaintiffs neglected to do so, they should be barred from further relief. It was the same storm, and the water was discharged, through the same culvert, upon land which was a part of the same tract that plaintiffs had rented. "The principle is settled beyond dispute that a judgment concludes the right of parties in respect to the cause of action stated in the pleadings in which it is rendered, whether the suit embraces the whole or only a part of the demand constituting the cause of action. It results from this principle, and the rule is fully established, that an entire claim, ensuing either upon a contract or from a wrong, cannot be divided, and made the subject of several suits; and, if several suits be brought for the different parts of the same claim, * * * judgment upon the merits in either will be available as a bar in the other suits. * * * In case of torts, each trespass or conversion or fraud gives a right of action, and but a single one, however numerous the items of wrong or damage may be." 1 Herm. Estop. § 77. If the rule were otherwise, the tract might have been divided up into 5, 10, or 15 acre tracts, and there might have been a series of vexatious law suits. "It is for the public good that there be an end to litigation." This view is well supported by authority. * * *

VII. Time to Which Compensation May Be Recovered— Past and Future Losses ³⁹

1. CONTINUING CONTRACTS

ROEHM v. HORST.

(Supreme Court of United States, 1900. 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953).

On writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a decision affirming a judgment for plaintiffs in an action on contract.

On August 25, 1893, the plaintiffs, Paul R. G. Horst and his

³⁹ For discussion of principles, see Hale on Damages (2d Ed.) § 34.

partners, agreed to sell, and the defendant, John Roehm, agreed to purchase, under four contracts, 400 bales of hops, of the crops of 1896 and 1897, to be delivered in installments from October, 1896, to July, 1898. The first contract, for 100 bales, covered the period from October, 1896, to March, 1897. On October 6, 1896, plaintiffs made the first shipment of 20 bales under the contract. Defendant refused to receive the hops, and on October 24, 1896, repudiated the contracts. The plaintiffs made no further efforts to make delivery, and brought action for damages in January 1897, in the United States Circuit Court for the Eastern District of Pennsylvania. There was judgment for plaintiffs (84 Fed. 565), which was affirmed by the United States Circuit Court of Appeals for the Third Circuit (91 Fed. 345, 33 C. C. A. 550). Thereupon defendant applied for a writ of certiorari, which was granted.

FULLER, C. J., delivered the opinion of the court:⁴⁰

It is conceded that the contracts set out in the finding of facts were four of ten simultaneous contracts, for 100 bales each, covering the furnishings of 1,000 bales of hops during a period of five years, of which 600 bales had been delivered and paid for. If the transaction could be treated as amounting to a single contract for 1,000 bales, the breach alleged would have occurred while the contract was in the course of performance; but plaintiffs' declaration or statement of demand averred the execution of the four contracts, "two for the purchase and sale of Pacific coast hops of the crop of 1896, and two for the purchase and sale of Pacific coast hops of the crop of 1897," set them out in extenso, and claimed recovery for breach thereof, and in this view of the case while as to the first of the four contracts, the time to commence performance had arrived, and the October shipment had been tendered and refused, the breach as to the other three contracts was the refusal to perform before the time for performance had arrived.

The first contract falls within the rule that a contract may be broken by the renunciation of liability under it in the course of performance and suit may be immediately instituted. But the other three contracts involve the question whether, where the contract is renounced before performance is due, and the renunciation goes to the whole contract, and is absolute and unequivocal, the injured party may treat the breach as complete and bring his action at once. Defendant repudiated all liability for hops of the crop of 1896 and of the crop of 1897, and notified plaintiffs that he should make (according to a letter of his attorney in the record that he had made) arrangements to purchase his stock of other parties, whereupon plaintiffs brought suit. The question is therefore presented, in respect of the three contracts, whether plaintiffs

⁴⁰ Part of the opinion is omitted and the statement of facts is rewritten.

were entitled to sue at once or were obliged to wait until the time came for the first month's delivery under each of them.

It is not disputed that if one party to a contract has destroyed the subject-matter, or disabled himself so as to make performance impossible, his conduct is equivalent to a breach of the contract, although the time for performance has not arrived; and also that if a contract provides for a series of acts, and actual default is made in the performance of one of them, accompanied by a refusal to perform the rest, the other party need not perform, but may treat the refusal as a breach of the entire contract, and recover accordingly.

And the doctrine that there may be an anticipatory breach of an executory contract by an absolute refusal to perform it has become the settled law of England as applied to contracts for services, for marriage, and for the manufacture or sale of goods.

* * *

The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due. If it appear that the party who makes an absolute refusal intends thereby to put an end to the contract so far as performance is concerned, and that the other party must accept this position, why should there not be speedy action and settlement in regard to the rights of the parties? Why should a locus poenitentiae be awarded to the party whose wrongful action has placed the other at such disadvantage? What reasonable distinction *per se* is there between liability for a refusal to perform future acts to be done under a contract in course of performance and liability for a refusal to perform the whole contract made before the time for commencement of performance? * * *

As to the question of damages, if the action is not premature, the rule is applicable that plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself. If a vendor is to manufacture goods, and during the process of manufacture the contract is repudiated, he is not bound to complete the manufacture, and estimate his damages by the difference between the market price and the contract price, but the measure of damage is the difference between the contract price and the cost of performance. *Hinckley v. Pittsburgh Bessemer Steel Co.*, 121 U. S. 264, 30 L. Ed. 967, 7 Sup. Ct. 875. Even if in such cases the manufacturer actually obtains his profits before the time fixed for performance, and recovers on a basis of cost which might have been increased or diminished by subsequent events, the party who broke the contract before the time for complete

performance cannot complain, for he took the risk involved in such anticipation. If the vendor has to buy instead of to manufacture, the same principle prevails, and he may show what was the value of the contract by showing for what price he could have made subcontracts, just as the cost of manufacture in the case of a manufacturer may be shown. Although he may receive his money earlier in this way, and may gain, or lose, by the estimation of his damage in advance of the time for performance, still, as we have seen, he has the right to accept the situation tendered him, and the other party cannot complain. * * * Judgment affirmed.

McMULLAN v. DICKINSON CO.

(Supreme Court of Minnesota, 1895. 60 Minn. 156. 62 N. W. 120, 27 L. R. A. 409, 51 Am. St. Rep. 511.)

CANTY, J.⁴¹ On the 25th of February, 1892, the plaintiff entered into a written agreement with the defendant corporation, whereby it agreed to employ him as its assistant manager, from and after that date, as long as he should own in his own name 50 shares of the capital stock of said corporation, fully paid up, and the business of said corporation shall be continued, not exceeding the term of the existence of said corporation, and pay him for such services the sum of \$1,500 per annum, payable monthly during that time, and whereby he agreed to perform said services during that time. He has ever since owned, as provided, the 50 shares of said stock, and performed said services ever since that time until the 28th of October, 1893, when he was discharged and dismissed by the defendant without cause. He alleges these facts in his complaint in this action, and also alleges that he has been ever since he was so dismissed, and is now, ready and willing to perform said services as so agreed upon, and that there is now due him the sum of \$125 for each of the months of March and April, 1894, and prays judgment for the sum of \$250. The defendant in its answer, for a second defense, alleges that on March 2, 1894, plaintiff commenced a similar action to this for the recovery of the sum of \$512, for the period of time from his said discharge to the 1st of March, 1894, alleging the same facts and the same breach, and that on April 16, 1894, he recovered judgment in that action against this defendant for that sum and costs, and this is pleaded in bar of the present action. The plaintiff demurred to this defense, and from an order sustaining the demurrer the defendant appeals.

The plaintiff brought each action for installments of wages claimed to be due, on the theory of constructive service. The doctrine of constructive service was first laid down by Lord El-

⁴¹ Part of the opinion is omitted.

lenborough in *Gandell v. Pontigny*, 4 Campb. 375, and this case was followed in England and this country for a long time (*Wood, Mast. & Serv.* 254), and is still upheld by several courts (*Isaacs v. Davies*, 68 Ga. 169; *Armfield v. Nash*, 31 Miss. 361; *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8). It has been repudiated by the courts of England (*Goodman v. Pocock*, 15 Adol. & E. [N. S.] 574; *Wood, Mast. & Serv.* 254), and by many of the courts in this country (*Id.*; and notes to *Decamp v. Hewitt*, 43 Am. Dec. 204), as unsound and inconsistent with itself, as it assumes that the discharged servant has since his discharge remained ready, willing, and able to perform the services for which he was hired, while sound principles require him to seek employment elsewhere, and thereby mitigate the damages caused by his discharge. His remedy is for damages for breach of the contract, and not for wages for its performance. But the courts, which deny his right to recover wages as for constructive service, have denied him any remedy except one for damages, which, if seemingly more logical in theory, is most absurd in its practical results. These courts give him no remedy except the one which is given for the recovery of loss of profits for the breach of other contracts, and hold that the contract is entire, even though the wages are payable in installments, and that he exhausts his remedy by an action for a part of such damages, no matter how long the contract would have run if it had not been broken. See *James v. Allen Co.*, 44 Ohio St. 226, 6 N. E. 246, 58 Am. Rep. 821; *Moody v. Leverich*, 4 Daly (N. Y.) 401; *Colburn v. Woodworth*, 31 Barb. (N. Y.) 381; *Booge v. Railroad Co.*, 33 Mo. 212, 82 Am. Dec. 160. No one action to recover all the damages for such a breach of such a contract can furnish any adequate remedy, or do anything like substantial justice between the parties. By its charter the life of this corporation is thirty years. If the action is commenced immediately after the breach, how can prospective damages be assessed for this thirty years, or for even one year? To presume that the discharged servant will not be able for a large part of that time to obtain other employment, and award him large damages, might be grossly unjust to the defendant. Again, the servant is entitled to actual indemnity, not to such speculative indemnity as must necessarily be given by awarding him prospective damages. His contract was not a speculative one, and the law should not make it such. That men can and do find employment is the general rule, and enforced idleness the exception. It should not be presumed in advance that the exceptional will occur.

This is not in conflict with the rule that, in an action for retrospective damages for such a breach, the burden is on the defendant to show that the discharged servant could have found employment. In that case, as in others, reasonable diligence will be presumed. When it appears that he has not found employment or been em-

ployed, there is no presumption that it was his fault, and, under such circumstances, it will be presumed that the exceptional has happened. But to presume that the exceptional will happen is very different. In an action for such a breach of a contract for services, prospective damages beyond the day of trial are too contingent and uncertain, and cannot be assessed. 2 Suth. Dam. 471; *Gordon v. Brewster*, 7 Wis. 355; *Fowler & Proutt v. Armour*, 24 Ala. 194; *Wright v. Falkner*, 37 Ala. 274; *Colburn v. Woodworth*, 31 Barb. (N. Y.) 385. Then, if the discharged servant can have but one action, it is necessary for him to starve and wait as long as possible before commencing it. If he waits longer than six years after the breach, the statute of limitations will have run, and he will lose his whole claim. If he brings his action within the six years, he will lose his claim for the balance of the time after the day of trial. Under this rule, the measure of damages for the breach of a thirty year contract is no greater than for the breach of a six or seven year contract. Such a remedy is a travesty on justice. Although the servant has stipulated for a weekly, monthly, or quarterly income, it assumes that he can live for years without any income, after which time he will cease to live or need income.

The fallacy lies in assuming that, on the breach of the contract, loss of wages is analogous to loss of profits, and that the same rule of damages applies, while in fact the cases are wholly dissimilar, and there is scarcely a parallel between them. In the one case the liability is absolute; in the other it is contingent. If the rule of damages were the same, then, in the case of the breach of the contract for service, the discharged servant should be allowed only the amount which the stipulated wages exceed the market value of the service to be performed, without regard to whether he could obtain other employment or not. If the stipulated wages did not exceed the market value of the service, he would be entitled to only nominal damages, and in no case could his failure to find other employment vary the measure of damages. Clearly, this is not the rule. In the one case the liability is a contingent liability for loss of wages; in the other case it is an absolute liability for loss of profits. Such contingent liability cannot be ascertained in advance of the happening of the contingency, and that is why prospective damages for loss of wages are too contingent and are too speculative and uncertain to be allowed, while retrospective damages for such loss are of the most certain character. On the other hand, if damages for loss of profits are too speculative and uncertain to be allowed, they are equally so, whether prospective or retrospective. "The pecuniary advantages which would have been realized but for the defendant's act must be ascertained without the aid which their actual existence would afford. The plaintiff's right to recover for such a loss depends on

his proving with sufficient certainty that such advantages would have resulted, and, therefore, that the act complained of prevented them." 1 Suth. Dam. (1st Ed.) 107.

It is our opinion that the servant wrongfully discharged is entitled to indemnify for loss of wages, and for the full measure of this indemnity the master is clearly liable. This liability accrues by installments on successive contingencies. Each contingency consists in the failure of the servant without his fault to earn, during the installment period named in the contract, the amount of wages which he would have earned if the contract had been performed, and the master is liable for the deficiency. This rule of damages is not consistent with the doctrine of constructive service, but it is the rule which has usually been applied by the courts which adopted that doctrine. Under that doctrine the master should be held liable to the discharged servant for wages as if earned, while in fact he is held only for indemnity for loss of wages. The fiction of constructive service is false and illogical, but the measure of damages given under that fiction is correct and logical. It is simply a case of a wrong reason given for a correct rule. Instead of rejecting the false reason and retaining the correct rule, many courts have rejected both the rule and the reason. In our opinion, this rule of damages should be retained; but the true ground on which it is based is not that of constructive service, but the liability of the master to indemnify the discharged servant, not to pay him wages, and this indemnity accrues by installments. The original breach is not total, but the failure to pay the successive installments constitutes successive breaches. Since the days of Lord Ellenborough this class of cases has been in some courts an exception to the rule that there can be but one action for damages for the breach of a contract, and there are strong reasons why it should be an exception.

Because the discharged servant may, if he so elects, bring successive actions for the installments of indemnity as they accrue, it does not follow that he cannot elect to consider the breach total, and bring one action for all his damages, and recover all of the same accruing up to the time of trial. * * * The order appealed from should be affirmed. So ordered.

2. CONTINUING TORTS

KANSAS PAC. RY. v. MIHLMAN.

(Supreme Court of Kansas, 1876. 17 Kan. 224.)

BREWER, J.⁴² Muhlman was the owner of a tract of land in Riley county. In December, 1866, he deeded the right-of-way through said land to the railway company, plaintiff in error, for its railroad. Prior to 1868 the road was constructed over this right-of-way. It is not claimed that the road was not built on the tract deeded, nor that it was unskillfully built. The road crossed at right angles a ravine which seems to have drained quite an extent of territory, and through which ran after a heavy rain a large volume of surface-water. It does not appear to have been technically a water-course, or that anything but surface-water ran through it. At or near this ravine the company built two culverts. Leading to and from these culverts, it, according to Muhlman's testimony, dug two or three ditches, partly on the right-of-way and partly on Muhlman's land. In 1872 and 1873, from these ditches, or in consequence of the culverts being unable to carry off all the surface-water, the land of Muhlman was flooded, and his crops destroyed; and for this damage he brought this action. It does not appear that the company entered upon Muhlman's land, or did any work thereon, at any time within five years prior to the commencement of this action. * * *

The first matter to which our attention is called, and which we shall notice, is that of the statute of limitations. Actions of trespass upon real property are barred in two years. Gen. St. 633, § 18, cl. 3. If the cause of action dates from the time the defendant entered upon the plaintiff's land and dug the ditches, and was simply for the trespass, it was barred; if from the time the injury to Muhlman's crops occurred, it would probably not be. So far as the company had acted, its action was finished when it had dug the ditches. (We are now considering the question with reference solely to what it did off its own land, and upon that of Muhlman.) It had invaded Muhlman's rights; it had committed a trespass on his lands. It was then responsible in an action for the injury it had done by that trespass. Such action might have been brought immediately, and in such action could have been recovered all damages done to Muhlman by the trespass, and which might have included the cost of restoring the ground to the condition it was before the digging of the ditches. What new act has the company

⁴² Part of the opinion is omitted.

since done? What wrong has it done to Muhlman's property? Nothing. Its hands have been still. It has made no new invasion of his rights. Suppose an action had been brought, and damages recovered, for the trespass immediately after it occurred: what new act of the company could now be alleged as the basis of recovery? True, the trespass has now resulted in greater loss than was then foreseen or estimated in assessment of damages: but an increase in the damages resulting adds no new cause of action.

* * *

There are cases, it is true, in which the cause of action is based upon the actual occurrence of damage, and dates therefrom, and not upon or from the prior act which resulted in the damage; but these are all cases in which the prior act is itself lawful, and furnishes no cause of action, or where it is considered as a continuing act; as, where one excavates on his own land, and thereby withdraws the lateral support to his neighbor's soil and buildings, the act is itself lawful, and only becomes the basis of a cause of action for damages when it actually results in injury; and the cause of action dates, not from the time of the excavation, but from the time of the subsidence. *Bonomi v. Backhouse*, 96 E. C. L. 653. Here no trespass is committed. The party is simply using his own property, and using it lawfully; and it is only when he conflicts with the rule "*Sic utere tuo ut alienum non lædas*," that his neighbor has any cause of complaint. If after the excavation he builds on his own ground a wall which continues the support of his neighbor's soil and buildings, that neighbor has no action. The excavation therefore is not the foundation of the action, but the damage consequential upon the excavation; and no cause of action exists until the damage occurs. * * *

Counsel here would make the gist of the action the continuance of the ditch; * * * but the fact is, the wrong was done when the ditch was dug, and an omission to re-enter and fill up the ditch was a breach of no legal duty. There are cases in which the original act is considered as a continuing act, and daily giving rise to a new cause of action. Where one creates a nuisance, and permits it to remain, so long as it remains it is treated as a continuing wrong, and giving rise, over and over again, to causes of action. But the principle upon which one is charged as a continuing wrongdoer is, that he has a legal right, and is under a legal duty, to terminate the cause of the injury. As to anything upon his own land, a party has a right to control and remove it, and if it is so much of an injury to his neighbor's rights as to amount to a nuisance, is under a legal obligation to do so; but as to that upon his neighbor's land, he has no such right, and is under no such duty. Hence the distinction between nuisance and trespass. * * *

It is true, the books speak of such a thing as a continuing trespass. In 1 Add. Torts, 332, it is said, that "If a man throws a heap of stones, or builds a wall, or plants posts or rails on his neighbor's land, and there leaves them, an action will lie against him for the trespass, and the right to sue will continue from day to day until the incumbrance is removed." And in the case of *Holmes v. Wilson*, 37 E. C. L. 273, 10 Adol. & E. 503, it appeared that the trustees of a turnpike to support it built buttresses on the plaintiff's land. He brought an action, and recovered for the trespass. He then notified them to remove the buttresses. Failing to do so, he sued again, and it was held that the action would lie. It seems to us very doubtful whether this ruling can be sustained upon principle. As suggested by the reporter, suppose plaintiff had recovered as a part of his damages in the first action, as he properly might, the expense of removing these buttresses, and this fact had appeared in the second suit: could the action have been maintained? And what difference, we ask, does it make, whether he did actually recover for such expense? It was a proper matter of damages; it was a part of the amount necessary to place the land as it was before the trespass; he was entitled to recover it, if he proved it; and if he failed to prove it, or if after proving it the court refused to allow it, neither the failure nor the error laid the foundation for a second action. And what right does the first trespass give the trespasser to re-enter and commit a second trespass?

True, in this case, the plaintiff had requested the trustees to remove the buttresses, and that might be considered a license to enter, and a waiver of the trespass. But where there is no such request, as in the case before us, how is it? If the railway company had entered to fill up the ditches, could not Muhlman have maintained his action for that as a trespass? Was he not at liberty to appropriate the benefit of the company's work in digging the ditches, and prevent any person from interfering therewith, and recover damages from any one that did interfere? It seems so to us, unquestionably. And it seems that the rule would be the same in case of such a trespass as suggested in Addison, of the building of a wall, or the heaping up of a pile of stones. Hence we doubt the doctrine as stated by him, and as decided in *Holmes v. Wilson*. At any rate, we do not think it can be extended beyond the character of trespasses there named, that is, those in which something is carried to and placed upon the land. Take this illustration: A. trespasses upon B.'s land, and digs a well. And that is a trespass very like that of digging a ditch. A. never enters upon the land again. The well is never filled up, but is permitted to remain. Twenty years thereafter, in a wet season, the water from the well soaks through the soil into a cellar, floods it, and causes damage. Is A. responsible for the damage? or does

the statute bar an action? Was the digging of the well a single act, and a completed wrong? or does its existence make A. a continuous trespasser, and liable for every recurring damage?

But without pursuing the discussion further, we hold that in digging the ditches on Muhlman's land the company was a trespasser; that the cause of action for that wrong was then complete, and then commenced to run; that the failure to enter and fill up the ditches, did not render the company guilty of continuing a nuisance, nor make it in any legal sense a continuous wrong-doer, and that therefore, as to any injury resulting therefrom, as shown in the record, the statute of limitations was a bar. * * * The judgment will be reversed, and the case remanded, with instruction to grant a new trial.⁴³

BOWERS v. MISSISSIPPI & R. R. BOOM CO.

(Supreme Court of Minnesota, 1899. 78 Minn. 398, 81 N. W. 208,
79 Am. St. Rep. 395.)

Action by Charles E. Bowers against the Mississippi & Rum River Boom Company. Verdict directed for defendant. From an order refusing a new trial, plaintiff appeals.

START, C. J.⁴⁴ This is an action to recover damages which the plaintiff claims to have sustained by the act of the defendant in placing piling in the Mississippi river opposite his farm, whereby the water in the river was turned from its natural course, and carried upon and against his land, washing away the shores thereof. The answer admitted and alleged that in the year 1887 the defendant, in the exercise of its charter powers as a corporation engaged in the business of booming and driving logs, placed the piling in the river for the purpose of keeping floating logs off from the sand bars therein, but that the defendant removed the piling in 1895. It further alleged that on May 4, 1895, the plaintiff duly recovered judgment against the defendant for the same cause of action alleged in the complaint in this action, and that such judgment has been paid and satisfied. The reply denied that the judgment pleaded as a bar was for the same cause of action as that alleged in the complaint herein.

The trial court, at the close of the evidence, directed a verdict for the defendant, on the ground that the judgment in the prior action was a bar to this one. * * * The question, then, for our consideration, is whether the trial court erred in holding that the prior judgment was a bar to this action.

⁴³ See, also, in connection with this case, *National Copper Co. v. Minnesota Mining Co.*, 57 Mich. 83, 23 N. W. 781, 58 Am. Rep. 333 (1885).

⁴⁴ Part of the opinion is omitted.

There was evidence, as to this question, tending to establish these facts: The defendant, in the year 1887, placed the piling in the river, and has ever since kept it there. The effect of this piling was and still is to turn the water, ice, and logs against plaintiff's land, whereby its shores were and are cut and washed away. The plaintiff, on February 5, 1895, brought an action against the defendant to recover the damages sustained by him by reason of such acts of the defendant, and recovered a judgment therefor in the sum of \$400, which is the prior judgment in question. It has been satisfied. In the prior action prospective damages were not claimed nor assessed. * * * Since February 5, 1895, some four acres more of the plaintiff's land have been washed away by reason of such piling being so maintained in the river, and this action is for the recovery of damages therefor.

The plaintiff was bound to recover in his first action all the damages which he was entitled to; and if he was then entitled to recover for all injuries, past, present, and future, to his land, by reason of the acts of the defendant in placing and maintaining the piling in the river, the judgment in the prior action is a bar to this one; for the plaintiff, if such were the case, could not split up his cause of action, and recover a part of his damages in the first action, and then bring this action for the rest of them. The defendant claims that the first action was just such a case, and that the trial court correctly held the judgment to be a bar. The test, whether an injury to real estate by the wrongful act of another is permanent in the sense of permitting a recovery of prospective damages therefor, is not necessarily the character, as to permanency, of the structure or obstruction causing the injury, but the test is whether the whole injury results from the original wrongful act, or from the wrongful continuance of the state of facts produced by such act. * * *

The adjudged cases are agreed as to the abstract rule that, where the injury wholly accrues and terminates when the wrongful act causing it is done, there can be but one action for the redress of the injury. But, where the injury is in the nature of a continuing trespass or nuisance, successive actions may be maintained for the recovery of the damages as they accrue. In the application of the rule, however, the authorities are somewhat conflicting. Fortunately, we are relieved from any uncertainty as to the application of the rule to the facts of this case by the decisions of this court; for they conclusively establish the proposition that the acts of the defendant, in placing and maintaining the piling in the river, whereby the water, logs, and ice were driven upon the shore of the plaintiff's land, were in the nature of a continuing trespass or nuisance, and that successive actions may be brought for the damages as they accrue. *Harrington v. Railroad Co.*, 17 Minn. 215 (Gil. 188); *Adams v. Railroad Co.*, 18 Minn. 260 (Gil. 236);

Brakken v. Railway Co., 29 Minn. 41, 11 N. W. 124; Bryne v. Railway Co., 38 Minn. 212, 36 N. W. 339, 8 Am. St. Rep. 668; Adams v. Railroad Co., 39 Minn. 286, 39 N. W. 629, 1 L. R. A. 493, 12 Am. St. Rep. 644; Lamm v. Railway Co., 45 Minn. 71, 47 N. W. 455, 10 L. R. A. 268.

The facts in these cases, except that of Bryne v. Railway Co., are similar. In each case the railway company built and maintained its roadbed, upon which to operate its cars, in a public street or highway, upon which the plaintiff's land abutted, and it was held that the acts of the defendant were a continuing trespass or nuisance, for which successive actions could be brought. The question is tersely and clearly discussed, and directly decided, in the last case cited. The satisfaction of the judgment in the first action brought by the plaintiff to recover the damages already accrued was not a purchase of the right to continue the trespass or nuisance, for it was not the equivalent of a judgment in condemnation proceedings. Lamm v. Railway Co., *supra*.

The defendant seeks to distinguish its case from the cases in this court, which we have cited, on the ground that it was authorized by law to place and maintain the piling in the river to facilitate the floating and driving of logs therein, and that no part of the piling was on the land of the plaintiff, and no negligence in the premises on its part is claimed. All these facts may be conceded, and still the act of the defendant in maintaining the piling be a continuing nuisance as to the plaintiff. The obstruction was lawful as to the public, but the legislature could not authorize the defendant to maintain it as against a private party whom it injured. Hueston v. Boom Co., 76 Minn. 251, 79 N. W. 92. The fact that the obstruction did not physically touch the plaintiff's land is immaterial: for while the trespass or injury is not direct, but indirect, the plaintiff's damages are just as great as if some part of the obstruction rested on his land. In the case of Bryne v. Railway Co., *supra*, the case of the injury to the plaintiff's land was the construction and maintenance of the defendant's roadbed, no part of which was on the plaintiff's land, so as to obstruct a natural water course. This was held to be a continuing nuisance, for which successive actions could be maintained. See, also, Jungblum v. Railroad Co., 70 Minn. 160, 72 N. W. 971.

In the case of Adams v. Railroad Co., 39 Minn. 286, 39 N. W. 629, 1 L. R. A. 493, 12 Am. St. Rep. 644, the defendant, by virtue of an ordinance of the city of Winona, lawfully constructed and operated its railway, without negligence, in and along a public street of the city upon which the plaintiff's land fronted, no part of which was physically touched by the railway, but it was injured thereby, and it was held that the measure of damages was the depreciation of the rental value of the land to the commencement of the action. The act of the defendant in the case at bar in placing and main-

taining the piling in the river was, whatever it may have been as to the public, as to the plaintiff a continuing trespass or nuisance, and he was entitled to bring successive actions to recover his damages as they accrued. It follows that the trial court erred in holding the former judgment a bar. Order reversed, and new trial granted.

3. DAMAGES CAUSED BY PERMANENT STRUCTURES

HARVEY v. MASON CITY & FT. D. R. CO.

(Supreme Court of Iowa. 1906. 129 Iowa, 465, 105 N. W. 958, 3 L. R. A. [N. S.] 973, 113 Am. St. Rep. 483.)

The plaintiff is the owner of a tract of land near the boundary of which there is a shallow pond. The natural slope and drainage of the tract and other land in the vicinity is in the direction of this pond. In 1902 the defendant company secured a right of way and constructed its railroad across plaintiff's farm and through the pond near its outlet. The track was laid on an embankment six feet above the surface of the pond. The defendant company attempted to provide for the drainage from the pond by a culvert. This culvert proved to be wholly insufficient to carry off the water, and in consequence thereof the water has been set back, injuring plaintiff's land and crops. This action is brought to recover damages therefor. There was judgment for defendant, and plaintiff appeals.

WEAVER, J.⁴⁵ * * * The one debatable question presented in argument is as to the measure of plaintiff's damages. It has quite frequently been held that damages for injury of a permanent character to real property, and especially where the wrong complained of is in the nature of a nuisance, which will continue indefinitely without change from any cause but human labor, are recoverable once for all, and that ordinarily the measure of such recovery is the decrease in the fair market value of the property on account of such injury. * * * In such case the damages are said to be original. But where the injury from the alleged nuisance is temporary in its nature, or is of a continuing or recurring character, the damages are ordinarily regarded as continuing, and one recovery against the wrongdoer is not a bar to successive actions for damages thereafter accruing from the same wrong. * * *

The principle upon which a party creating a continuing nuisance

⁴⁵ Part of the opinion is omitted and the statement of facts is rewritten.

is held liable to successive actions for damages is that he had a legal right and is under legal obligation to remove, change, or repair the structure or thing complained of, and thereby terminate the injury to his neighbor; and, failing so to do, each day's continuance of the nuisance is a repetition of the original wrong, and a new action will lie therefor. *Railroad v. Muhlman*, 17 Kan. 231; *New Salem v. Mill Co.*, 138 Mass. 8; *Colrick v. Swinburne*, 105 N. Y. 503, 12 N. E. 427. If the structure or thing complained of is of a lasting character, though perhaps not strictly permanent according to the ordinary definition of the term, it has also been held that the person injured may elect to treat it as permanent and recover original damages, and a judgment obtained in an action tried upon that theory will operate as a bar to any further claim for damages on account of the continuance of the nuisance. *Aldworth v. Lynn*, 153 Mass. 53, 26 N. E. 229, 10 L. R. A. 210, 25 Am. St. Rep. 608; *Ridley v. Railroad*, 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708; *White v. Railroad Co.*, 113 N. C. 610, 18 S. E. 330, 22 L. R. A. 627, 37 Am. St. Rep. 639; *Fowle v. New Haven & Northampton Co.*, 112 Mass. 334, 17 Am. Rep. 106. And see *Hollenbeck v. Marion*, 116 Iowa, 69, 89 N. W. 210; *Noe v. Railroad*, 76 Iowa, 362, 41 N. W. 42; *Hodge v. Shaw*, 85 Iowa, 137, 52 N. W. 8, 39 Am. St. Rep. 290.

The confusion which is found in the precedents has arisen not so much from the statement of governing principles as from the inherent difficulty in clearly distinguishing injuries which are original and permanent from those which are continuing, and in assigning each particular case to its appropriate class. In *Powers v. Council Bluffs*, 45 Iowa, 652, 24 Am. Rep. 792, this court cited with approval the definition of permanent injury given in *Troy v. Railroad Co.*, 3 Fost. (N. H.) 83, 55 Am. Dec. 177: "Whatever the nuisance is of such character that its continuance is necessarily an injury, and where it is of a permanent character that will continue without change from any cause except human labor, there the damage is an original damage, and may be at once fully compensated." This definition we still think correct, but a failure to carefully construe and apply it has led to some apparent inconsistencies in this and some other courts.

It will be observed from a reading of the quoted paragraph that the term "permanent," so often made use of in connection with the right to recover original damages, has reference not alone to the character of the structure or the thing which produces the alleged injury, but also to the character of the injury produced by it. In other words, the structure or thing producing the injury may be as permanent and enduring as the hand of man can make it, yet if the resulting injury be temporary or intermittent, depending on future conditions which may or may not arise, the damages are continuing, and successive actions will lie for suc-

cessive injuries. This thought, which is clearly implied in the quoted definition, is further elaborated in the same case (*Troy v. Railroad Co.*, supra) as follows: "But where the continuance of such act is not necessarily injurious, and where it is necessarily of a permanent character, but may or may not be injurious, or may or may not be continued, then the injury to be compensated in a suit is only the damage that has happened."

Stating the same rule in somewhat different form, it has also been said that "when such structure is permanent in its character and its structure and maintenance are not necessarily injurious, but may or may not be so, the injury to be compensated in a suit is only the damage which has happened, and there can be as many successive recoveries as there are successive injuries." *Railroad Co. v. Biggs*, 52 Ark. 240, 12 S. W. 331, 6 L. R. A. 804, 20 Am. St. Rep. 174. * * * Possibly as good an illustration of the distinction as can be suggested is in the case of the construction of a milldam across the course of a stream. So far as the dam operates to permanently overflow the land of another and take away from the owner all beneficial use of his property, the damage may be treated as original and all recovered in one action; but so far as it may cause only a periodical or occasional flooding the damage is continuing and successive recoveries can be had. *Bizer v. Ottumwa H. P. Co.*, 70 Iowa, 145, 30 N. W. 172; *Close v. Samm*, 27 Iowa, 503; *Gibson v. Fischer*, 68 Iowa, 29, 25 N. W. 914; *Watson v. Van Meter*, 43 Iowa, 76.

Not keeping in mind this distinction between the permanent character of the cause and the resultant injury, the court has been led in a few instances to appear to make the former the sole test whether the damages in question were original; but we think this has never been done where the question here presented has been raised and considered. More frequently than otherwise, in cases of this class, the court has simply decided the question before it on the theory upon which it has been presented by counsel, without attempting to determine its correctness as an abstract principle. As applied to obstructions of water and drainage ways by railway embankments, some courts have drawn a distinction, not generally recognized, between those which are constructed solidly, without culvert, trestle, or other opening for the escape of water, and those in which an opening is provided, but proves to be insufficient for the purpose. According to these precedents, the first condition above mentioned presents a case for original damages, and the latter a case for continuing damages. Such seems to have been the thought controlling the decision in *Haisch v. Railroad Co.*, 71 Iowa, 606, 33 N. W. 126, and *Stodghill v. Railroad Co.*, 53 Iowa, 341, 5 N. W. 495.

Applying the test suggested by the foregoing discussion, we are disposed to hold that damages arising from the occasional flooding

of land by reason of an insufficient culvert upon the land of an adjacent proprietor are not original, although if the claim for damages be made and the action be tried on the theory that they are original, the parties will be bound thereby. In this conclusion we are supported by the great preponderance of the authorities. * * * The case of *Fowle v. Railroad Co.*, 107 Mass. 352, which has been quite frequently cited as sustaining the opposite theory is, upon that point, expressly disapproved by the same court in the later case of *Aldworth v. Lynn*, 153 Mass. 53, 26 N. E. 229, 10 L. R. A. 210, 25 Am. St. Rep. 608.

It must be remembered, also, in the case at bar, that the embankment complained of was lawfully made, for a lawful purpose, and wholly upon the premises of the defendant. In itself it did not constitute an invasion of the plaintiff's property or property rights, and the injuries, if any, to the adjacent land, were consequential, only arising from the negligence of the defendant in constructing it. Such being the case, it would seem an elementary proposition that to recover damages the plaintiff must show that he has in fact suffered injury therefrom, and not simply that an injury is threatened. Possibly the threatened injury might be sufficient ground to sustain a suit in equity for an injunction (*Moore v. Railroad Co.*, 75 Iowa, 263, 39 N. W. 390); but we find no precedent for holding it a sufficient basis for an action at law for the recovery of damages. This rule has been directly and indirectly affirmed by us on repeated occasions. *Miller v. Railroad Co.*, 63 Iowa, 680, 16 N. W. 567; *Sullens v. Railroad Co.*, 74 Iowa, 659, 38 N. W. 545, 7 Am. St. Rep. 501; *Powers v. Council Bluffs*, 45 Iowa, 652, 24 Am. Rep. 792; *Hunt v. Railroad Co.*, 86 Iowa, 22, 52 N. W. 668, 41 Am. St. Rep. 473; *Drake v. Railroad Co.*, 63 Iowa, 309, 19 N. W. 215, 50 Am. Rep. 746; *Van Orsdol v. Railroad Co.*, 56 Iowa, 470, 9 N. W. 379; *Pettit v. Grand Junction*, 119 Iowa, 352, 93 N. W. 381.

The *Powers Case*, above cited, has been much criticised as announcing the doctrine that the right of action to the landowner dates from the negligent act which results in injury to his property, and as making an improper application of the rule of permanent damages. It has also been repeatedly distinguished by us in later cases, and we have declined to extend the application of the doctrine there announced. *Pettit v. Grand Junction*, 119 Iowa, 352, 93 N. W. 381; *Costello v. Pomeroy*, 120 Iowa, 213, 94 N. W. 490; *Drake v. Railroad Co.*, 63 Iowa, 309, 19 N. W. 215, 50 Am. Rep. 746. The first criticism above mentioned is based upon a misapprehension of the facts there presented. The wrongful act there charged was the negligent changing of the course of a stream in such manner that a gradual cutting back and widening of its channel from its point of discharge ensued. The change was made

in 1859, but the recession of the cut did not reach plaintiff's lot until the year 1866. More than five years after the latter date plaintiff brought suit, and his claim was held to be barred. The right of action was not held, as has been supposed, to have accrued when the course of the stream was negligently changed, but when the plaintiff's premises were actually encroached upon. Such was our construction of the rule of Powers' Case in deciding *Miller v. Railroad*, 63 Iowa, 680, 16 N. W. 567, although we later fell into the error of citing it in the opposite effect in *Grand Lodge v. Graham*, 96 Iowa, 614, 65 N. W. 837, 31 L. R. A. 133.

We think, however, that so far as the Powers Case goes to the time when a right of action accrued to the property owner it is correctly interpreted in the Miller Case, and is strictly in harmony with the weight of authority. It is also an important consideration that the Powers Case was against a municipal corporation, the liability of which for injuries of this nature is restricted within much narrower limits than is the liability of the private citizen. *Vanderweile v. Taylor*, 65 N. Y. 341; *Cedar Falls v. Hansen*, 104 Iowa, 189, 73 N. W. 585, 65 Am. St. Rep. 439.

The further question, whether the injury there under consideration should have been held to be permanent and damages recoverable once for all from the moment the stream ate its way across the boundary of plaintiff's lot, admits of more doubt, and whether we should be inclined to apply the undoubted rule of law there affirmed to another case involving like fact conditions we need not now consider or decide. * * * The judgment appealed from is therefore reversed.⁴⁶

HENRY v. OHIO RIVER R. CO.

(Supreme Court of Appeals of West Virginia, 1895. 40 W. Va. 234, 21 S. E. 863.)

Trespass on the case, brought by Darius Henry against the Ohio River Railroad Company. The trial court directed a verdict for defendant, and, judgment being entered thereon, plaintiff brings error.

BRANNON, J.⁴⁷ * * * I will now consider whether, under the evidence, the action was barred, so as to see whether the action of the court in directing the jury to find for the defendant, on the theory that the action was barred, is correct or erroneous. The ground of action averred in the declaration is that the plaintiff was owner of a lot of land in the town of Clifton, on which was his dwelling, bounding on a certain street, and the railroad company

⁴⁶ See, also, *Doran v. City of Seattle*, 24 Wash. 182, 64 Pac. 230, 54 L. R. A. 532, 85 Am. St. Rep. 948 (1901), where will be found a general review of authorities.

⁴⁷ Part of the opinion is omitted and the statement of facts is rewritten.

built its railroad across the street, and in so doing raised an embankment across the street on which its track was laid, and maintains it to the great detriment of the said property; that running along by the side of the street, and within its bounds, is a drain or culvert used to carry off water accumulating on the street from rain and snow; that the embankment was so carelessly, negligently, and unskillfully made that the water cannot pass off the street, as it had always done before the embankment was made, but, by reason of such improper construction of the embankment, gathers on the street in great quantity, and flows into the plaintiff's lot, and into the cellar under his dwelling, and remains in the cellar for weeks and months, and deprives the plaintiff of the use of the cellar, and renders the dwelling damp and unhealthy, and damages the use of the property as a home, and renders the property less valuable than it would be without the embankment.

Though general detriment to the plaintiff's property is alleged, the specification is the overflow of water from rains and snows, transient and recurrent causes. When does the statute of limitations begin to run in such case? Shall we count from the making of the embankment, or from each overflow as it recurs? Here the lines of thought and demarcation are close, the application of principles of law in particular instances difficult, and the authorities differing. The statute begins to run from the time the cause of action accrues. But when did that accrue in this case? The act of the defendant was the building of the embankment, but that, in itself, alone did not harm the plaintiff. He could not sue for that, as no harm as yet was done his property. Later on damage is done him by overflow. The water is the immediate agent doing the injury. We seek the cause of its presence, and find the embankment is the cause of its presence. The overflow is consequential from the embankment. Never till this overflow did the plaintiff have right to sue. Had he sued at once on the making of the road, what would have been the basis of damage? The building of the embankment was the remote or primal cause—the *causa causans*—in the line or process of the production of the injury; but the overflow consequent upon it is the direct cause of harm—the *gravamen* of the action. If one put a log in the road, no individual can sue for that only; but if he fall over it he may sue, and the statute runs from the fall. There must be a wrong and some loss to warrant an action. The action accrues when the damage is sustained by the plaintiff, not when the causes are first set in motion ultimately producing the injury as a consequence. Wood, Nuis. § 865; Lewis, Em. Dom. § 666; Wood, Lim. § 180; 16 Am. & Eng. Enc. Law, 988; 13 Am. & Eng. Enc. Law, 667; Ang. Lim. § 300.

As stated in the elaborate and valuable note to case of *Wells v. New Haven & Northampton Co.*, 151 Mass. 46, 23 N. E. 724, 21

Am. St. Rep. 423 in 1 Am. Ry. & Corp. Rep. 708, the fundamental question is one of damages, and may be put thus: When, in a suit for damages resulting from a wrongful act, must there be a recovery in one suit for all damages past and prospective, and when must the recovery be limited to damages prior to the suit, leaving future damages for future suits, as future damages occur? The question usually comes up in one of three forms: In considering the measure of damages, in considering whether the action is barred by limitation, and in considering whether it is barred by a former recovery. Now, when the case is one of such nature as to enable the party in one suit to recover future as well as past damages, there the statute runs from the original beginning of the nuisance; but, where there can only be recovery for past damages, the statute does not run from the institution of the nuisance, but from the injury, when it occurs or recurs as its consequence. Where the nuisance is permanent, so that it will continue unless labor be applied to change it, and it necessarily injures the plaintiff, there must be a recovery in one suit for all damage, and none other can be afterwards brought, and recovery of damages will give the defendant right to continue his nuisance without further claim from the individual; but, where it is otherwise, there cannot be recovery for future damages, but only from time to time as they occur, and one recovery does not justify the perpetuation of the nuisance, but there may be recovery after recovery, as long as continued. This doctrine is well settled and is recognized by this court in *Hargreaves v. Kimberly*, 26 W. Va. 787, 53 Am. Rep. 121; *Watts v. Railroad Co.*, 39 W. Va. 196, 19 S. E. 521, 23 L. R. A. 674, 45 Am. St. Rep. 894; *Rogers v. Driving Co.*, 39 W. Va. 272, 19 S. E. 401. See *Wood*, Nuis. § 865; *Wood*, Lim. § 180. See exhaustive note to *Hargreaves v. Kimberly*, 53 Am. Rep. 123, being the opinion in *Uline v. Railroad Co.*, 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661.

In *Plate v. Railroad Co.*, 37 N. Y. 473, an action for maintaining railroad track and ditches, causing water to flow on land, just like this case, it was held that a former recovery was no bar to a second action, and that only past, not prospective, damages could be recovered in such case. The New York cases collected in the opinion of *Uline v. Railroad Co.*, just mentioned, strongly support our view. In our case of *Hargreaves v. Kimberly* it is stated as a criterion whether one recovery would give a right to continue the cause. The trouble is to see what cases they are; in what cases a recovery for a trespass would confer a right, pass title to occupy land, or permanently injure it. Can land be thus acquired? I, however, make no point on this, but the suggestion or doubt only strengthens the holding on the real point in this case. Can it be possible that an amount of damages could in this suit be recovered to cover all damages for all time to come from repeated

overflows, when the company might, by small work, entirely remedy the evil? Could the jury or we act on any assumption that it would not do so, rather than suffer repeated actions? I think not. It seems settled that, if a milldam cause an overflow upon land of a riparian owner, the cause of action is continuous, and he can sue as long as the overflow continues, until the right to overflow is vested and justified by prescription. *Staple v. Spring*, 10 Mass. 72; *Field v. Brown*, 24 Grat. (Va.) 74.

I would liken this case to the case of a milldam, save that, if any different, this is more plainly the case of continuous injury, actionable upon each recurring overflow. I think the general rule as to nuisances applies to this case, it being one of recurring, intermittent, or occasional injury. That rule is that every continuance from day to day is a new nuisance, for which a fresh action lies, so that, though action for the original nuisance be barred, damages are recoverable for the statutory period for injuries within it, provided enough time has not elapsed to give the person maintaining the nuisance a right to do so by adversary use. 4 Minor, Inst. 509 (472), 546 (507); Wood, Nuis. § 865; Wood, Lim. § 180. Now, this embankment itself has the element of permanency, it is true, and that far complies with the rule warranting recovery of past and future damages, in one action, but it does not necessarily per se injure the plaintiff's property in the respect to the mode of injury charged; that is, overflow. That happens only when rains or snows come. If the suit were for cutting off access by reason of the embankment only, it would be different. *Smith v. Railroad Co.*, 23 W. Va. 451.

To warrant final recovery for past and future damage, there must be a structure permanent in nature, and damage directly and at once necessarily arising from it. In *Miller v. Railway Co.*, 63 Iowa, 680, 16 N. W. 567, it was held that against a cause of action for damages from water flowing through a ditch wrongfully dug, the statute runs, not from the date of digging the ditch, but from damage caused by it. In *Wells v. New Haven & Northampton Co.*, supra, it was held that where a railroad company collected the water of eight natural streams, and discharged it with considerable surface water upon land where much of it had not been accustomed to flow, that the nuisance was continuous, and action was not barred in six years from the erection, and one subsequently purchasing the land could sue for damages. So one purchasing after the improvement recovered in *Canal Co. v. Lee*, 22 N. J. Law, 243, which he could not do if the cause of action accrued from the date of the work. Here the cause of action is not from the work, as it would be if the action were for the mere construction of the embankment on plaintiff's land without authority, or for cutting off access to his lot. The construction of the work was lawful and authorized, but it is the manner of construction, the

negligent manner of construction, entailing injury later as a consequence by producing overflow, that is alleged as the wrong.

The plea was properly received, but the evidence showed overflow within five years, and hence the plea could not justify judgment for defendant, as, although the embankment was more than five years old, the case was not such as would have warranted recovery of future damages had an action been brought within five years from the erection of the embankment, and, the damages being continuous, the statute ran, not from its erection, but from the overflow. So we hold that the court erred in directing the jury to find for the railroad company on the idea that the action was barred by time. That, though a work of improvement, like a railroad, is lawful and under authority, yet, if damage result to an individual by overflow of water by reason of negligent construction, he can recover, is well settled. *Gillison v. City of Charleston*, 16 W. Va. 282, 37 Am. Rep. 763; *Knight v. Brown*, 25 W. Va. 808; *Taylor v. Railroad Co.*, 33 W. Va. 39, 10 S. E. 29. It is only an application of the maxim: "So use your own property or right that you do not injure another." I understand, indeed, that in this state negligence is not an essential to recovery, but only damage. *Gillison v. City of Charleston*, 16 W. Va. 282, 37 Am. Rep. 763; *Johnson v. Parkersburg*, 16 W. Va. 402, 37 Am. Rep. 779. But, where the landowner has been compensated, negligent construction is required to maintain action. * * * Reversed and remanded.

VIII. Elements of Compensation—Physical Pain and Inconvenience ⁴⁸

GOODHART v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, 1896. 177 Pa. 1, 35 Atl. 191, 55 Am. St. Rep. 705.)

Action by James M. Goodhart against the Pennsylvania Railroad Company for damages for personal injuries. There was judgment for plaintiff and defendant appeals.

WILLIAMS, J.⁴⁹ The plaintiff received the injury complained of while a passenger on one of the trains of defendant company. * * * Damages for a personal injury consist of three principal items: First, the expenses to which the injured person is subjected

⁴⁸ For discussion of principles, see Hale on Damages (2d Ed.) §§ 35-39.

⁴⁹ Part of the opinion is omitted.

by reason of the injury complained of; second, the inconvenience and suffering naturally resulting from it; third, the loss of earning power, if any, and whether temporary or permanent, consequent upon the character of the injury. *Owens v. Railway Co.*, 155 Pa. 334, 26 Atl. 748.

The expenses for which a plaintiff may recover must be such as have been actually paid, or such as, in the judgment of the jury, are reasonably necessary to be incurred. The plaintiff cannot recover for the nursing and attendance of the members of his own household, unless they are hired servants. The care of his wife and minor children in ministering to his needs involves the performance of the ordinary offices of affection, which is their duty; but it involves no legal liability on his part, and therefore affords no basis for a claim against a defendant for expenses incurred. A man may hire his own adult children to work for him in the same manner and with same effect that he may hire other persons, but, in the absence of an express contract, the law will not presume one, so long as the family relation continues.

Pain and suffering are not capable of being exactly measured by an equivalent in money, and we have repeatedly said that they have no market price. The question in any given case is not what it would cost to hire some one to undergo the measure of pain alleged to have been suffered by the plaintiff, but what, under all the circumstances, should be allowed the plaintiff in addition to the other items of damage to which he is entitled, in consideration of suffering necessarily endured. *Baker v. Pennsylvania Co.*, 142 Pa. 503, 21 Atl. 979, 12 L. R. A. 698. This should not be estimated by a sentimental or fanciful standard, but in a reasonable manner, as it is wholly additional to a pecuniary compensation afforded by the first and third items that enter into the amount of the verdict in such cases. By way of illustration, let us assume that a plaintiff has been wholly disabled from labor for a period of 20 days in consequence of an injury resulting from the negligence of another. This lost time is capable of exact compensation. It will require so much money as the injured man might have reasonably earned in the same time by the pursuit of his ordinary calling.

But let us further assume that these days of enforced idleness have been days of severe bodily suffering. The question then presented for the consideration of the jury would be: What is it reasonable to add to the value of the lost time in view of the fact that the days were filled with pain, instead of being devoted to labor? Some allowance has been held to be proper; but, in answer to the question, "How much?" the only reply yet made is that it should be reasonable in amount. Pain cannot be measured in money. It is a circumstance, however, that may be taken into the account in fixing the allowance that should be made to an

injured party by way of damages. An instruction that leaves the jury to regard it as an independent item of damages, to be compensated by a sum of money that may be regarded as a pecuniary equivalent, is not only inexact, but it is erroneous. The word "compensation," in the phrase "compensation for pain and suffering," is not to be understood as meaning price or value, but as describing an allowance looking towards recompense for or made because of the suffering consequent upon the injury. In computing the damages sustained by an injured person, therefore, the calculation may include not only loss of time and loss of earning power, but, in a proper case, an allowance because of suffering.

The third item, the loss of earning power, is not always easy of calculation. It involves an inquiry into the value of the labor, physical or intellectual, of the person injured, before the accident happened to him, and the ability of the same person to earn money by labor, physical or intellectual, after the injury was received. Profits derived from an investment or the management of a business enterprise are not earnings. The deduction from such profits of the legal rate of interest on the money employed does not give to the balance of the profits the character of earnings. The word "earnings" means the fruit or reward of labor; the price of services performed. *And. Law Dict.* 390. Profits represent the net gain made from an investment, or from the prosecution of some business, after the payment of all expenses incurred. The net gain depends largely on other circumstances than the earning capacity of the persons managing the business. The size and location of the town selected, the character of the commodities dealt in, the degree of competition encountered, the measure of prosperity enjoyed by the community, may make an enterprise a decided success, which under less favorable circumstances, in the hands of the same persons, might turn out a failure. The profits of a business with which one is connected cannot therefore be made use of as a measure of his earning power. Such evidence may tend to show the possession of business qualities, but it does not fix their value. Its admission for that purpose was error.

It was also error to treat this subject of the value of earning power as one to be settled by expert testimony. An expert in banking or merchandizing might form an opinion about what a man possessing given business qualifications ought to be able to earn, but this is not the question the jury is to determine. They are interested only in knowing what he did actually earn, or what his services were reasonably worth, prior to the time of his injury. In settling this question, they should consider not only his past earnings, or the fair value of services such as he was able to render, but his age, state of health, business habits, and manner of living. *McHugh v. Schlosser*, 159 Pa. 480, 28 Atl. 291, 23 L. R. A. 574, 39 Am. St. Rep. 699. * * *

Another subject requires consideration. The verdict rendered by the jury gives the calculation upon which the enormous sum awarded to the plaintiff was based. From this it appears that the sum of \$19,526.50 was given as the cost of an annuity of \$1,750 per annum for 19 years. This calculation assumes (1) that the plaintiff's earning power was nearly twice as great as he had himself offered it for to the company whose president and manager he was. It assumes (2) that he had a reasonable expectation of life for 19 years, being at the time of the trial about 53 years old. It assumes (3) that his earning power, instead of steadily decreasing with increasing years, would hold up at its maximum to the very end of life. It assumes, in the fourth place, that he is entitled to recover, not only the present worth of his future earnings, as the jury has estimated them, but a sufficient sum to enable him to go out into the market, and purchase an annuity now, equal to his estimated earnings. The first, second, and third of these are assumptions of fact. The fourth is an assumption of law, and is clearly wrong. When future payments are to be anticipated and capitalized in a verdict, the plaintiff is entitled only to their present worth. This is the exact equivalent of the anticipated sums. * * * The judgment is reversed, and a venire facias de novo awarded.⁵⁰

TURNER v. GREAT NORTHERN RY. CO.

(Supreme Court of Washington, 1896. 15 Wash. 213, 46 Pac. 243, 53 Am. St. Rep. 883.)

The plaintiff and his wife purchased through tickets from St. Paul, Minn., to Spokane, Wash., over the defendant company's road, the latter then knowing that through transportation was impossible over its lines. At Havre, Mont., the plaintiff was directed to leave the train, to proceed to Helena, and then to take the road of the Northern Pacific Railroad Company, which company, the defendant stated, would honor plaintiff's ticket. This it, however, refused to do. Plaintiff was compelled to pay fare, and afterward was delayed at Missoula for 18 days by reason of floods. A verdict was rendered for \$750.

ANDERS, J.⁵¹ * * * In answer to the question, "Now, Colonel, I wish you would go on and state to the jury what, if any, anxiety, worryment, etc., you suffered on account of your delay, being separated from your baggage, and all of those things that are proper under the ruling of the court, in consequence of this

⁵⁰ See, also, *Schenkel v. Pittsburg & B. Traction Co.*, 194 Pa. 182, 44 Atl. 1072 (1899).

⁵¹ Part of the opinion is omitted and the statement of facts is rewritten.

delay," the plaintiff was allowed, notwithstanding the defendant's objection, to testify that he was greatly worried, troubled, and annoyed by the combination of circumstances surrounding him at that time, among which were that he had to pay out more money than he had contemplated paying out; that the Northern Pacific Railroad Company would not board him at Missoula, as they did their passengers; his means were limited, and he did not know how long he had to stay there; that he could not hear from home, the telegraph line being broken down; that his wife was taken sick, and lay in bed three days, in consequence of her worryment, and that he could not make her comfortable under the circumstances. Damages for "worryment" and disappointment resulting from such circumstances are too remote to be recovered in this action. The mental anxiety of the plaintiff induced by the sickness of his wife and his inability to make her comfortable, or his limited means, or his inability to hear from home owing to the interruption of telegraphic communication, cannot be regarded as the proximate result of the alleged wrongful acts, or omissions of the defendant, and the court therefore erred in permitting this testimony to be submitted to the consideration of the jury.

The court also erred, and for the same reason, in instructing the jury generally that the plaintiff was entitled to recover, for worry and mental excitement, such sum as would fairly and reasonably compensate him therefor. "Damages will not be given for mere inconvenience and annoyance such as are felt at every disappointment of one's expectations, if there is no actual physical or mental injury." 1 Sedg. Dam. (8th Ed.) § 42. And hence damages cannot be recovered for anxiety and suspense of mind in consequence of delay caused by the fault of a common carrier. *Trigg v. Railway Co.*, 74 Mo. 147, 41 Am. Rep. 305; *Hobbs v. Railway Co.*, L. R. 10 Q. B. 111; *Hamlin v. Railway Co.*, 1 Hurl. & N. 408; *Walsh v. Railway Co.*, 42 Wis. 23, 24 Am. Rep. 376. * * *

Surely no court could say that, in contemplation of law, the mental agitation or excitement caused by being delayed on a journey is of a different character from that produced by unexpectedly having to pay extra fare for transportation. The mental sensation in each case, whether it be called excitement, anxiety, annoyance, or worry, is manifestly the result of disappointed hope or expectation merely, for which, as we have seen, no damages can be awarded. * * *⁵²

⁵² See, also, *Baltimore & O. R. Co. v. Carr*, post, p. 204.

IX. Same—Mental Suffering ⁵³

1. AS THE BASIS OF A CAUSE OF ACTION

LARSON v. CHASE.

(Supreme Court of Minnesota, 1891. 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 55, 28 Am. St. Rep. 370.)

Action by Lena Larson against Charles A. Chase for the unlawful mutilation and dissection of the body of plaintiff's husband. The only damages alleged were mental suffering and nervous shock. A demurrer to the complaint, as not stating a cause of action, was overruled, and defendant appeals.

MITCHELL, J.⁵⁴ This was an action for damages for the unlawful mutilation and dissection of the body of plaintiff's deceased husband. * * *

The contentions of defendant may be resolved into two propositions. First. That the widow has no legal interest in or right to the body of her deceased husband, so as to enable her to maintain an action for damages for its mutilation or disturbance; that, if any one can maintain such an action, it is the personal representative. Second. That a dead body is not property, and that mental anguish and injury to the feelings, independent of any actual tangible injury to person or property, constitute no ground of action. Time will not permit, and the occasion does not require, us to enter into any extended discussion of the history of the law, civil, common, or ecclesiastical, of burial and the disposition of the body after death. * * *

Whatever may have been the rule in England under the ecclesiastical law, and while it may be true still that a dead body is not property in the common commercial sense of that term, yet in this country it is, so far as we know, universally held that those who are entitled to the possession and custody of it for purposes of decent burial have certain legal rights to and in it which the law recognizes and will protect. Indeed, the mere fact that a person has exclusive rights over a body for the purposes of burial leads necessarily to the conclusion that it is his property in the broadest and most general sense of that term, viz., something over which the law accords him exclusive control. But this whole subject is only obscured and confused by discussing the question whether a corpse is property in the ordinary commercial sense, or

⁵³ For a discussion of principles, see Hale on Damages (2d Ed.) §§ 40-41.

⁵⁴ Part of the opinion is omitted and the statement of facts is rewritten.

whether it has any value as an article of traffic. The important fact is that the custodian of it has a legal right to its possession for the purposes of preservation and burial, and that any interference with that right by mutilating or otherwise disturbing the body is an actionable wrong. And we think it may be safely laid down as a general rule that an injury to any right recognized and protected by the common law will, if the direct and proximate consequence of an actionable wrong, be a subject for compensation.

It is also elementary that while the law as a general rule only gives compensation for actual injury, yet, whenever the breach of a contract or the invasion of a legal right is established, the law infers some damage, and, if no evidence is given of any particular amount of loss, it declares the right by awarding nominal damages. Every injury imports a damage. Hence the complaint stated a cause of action for at least nominal damages. We think it states more. There has been a great deal of misconception and confusion as to when, if ever, mental suffering, as a distinct element of damage, is a subject for compensation. This has frequently resulted from courts giving a wrong reason for a correct conclusion that in a given case no recovery could be had for mental suffering, placing it on the ground that mental suffering, as a distinct element of damage, is never a proper subject of compensation, when the correct ground was that the act complained of was not an infraction of any legal right, and hence not an actionable wrong at all, or else that the mental suffering was not the direct and proximate effect of the wrongful act.

Counsel cites the leading case of *Lynch v. Knight*, 9 H. L. Cas. 577-598. We think he is laboring under the same misconception of the meaning of the language used in that case into which courts have not infrequently fallen. Taking the language in connection with the question actually before the court, that case is not authority for defendant's position. It is unquestionably the law, as claimed by appellant, that "for the law to furnish redress there must be an act which, under the circumstances, is wrongful; and it must take effect upon the person, the property, or some other legal interest, of the party complaining. Neither one without the other is sufficient." This is but another way of saying that no action for damages will lie for an act which, though wrongful, infringed no legal right of the plaintiff, although it may have caused him mental suffering. But, where the wrongful act constitutes an infringement on a legal right, mental suffering may be recovered for, if it is the direct, proximate, and natural result of the wrongful act. It was early settled that substantial damages might be recovered in a class of torts where the only injury suffered is mental—as for example, an assault without physical contact. So, too, in actions for false imprisonment, where the plaintiff was not touched by the defendant, substantial damages have been recov-

ered, though physically the plaintiff did not suffer any actual detriment. In an action for seduction substantial damages are allowed for mental sufferings, although there be no proof of actual pecuniary damages other than the nominal damages which the law presumes. The same is true in actions for breach of promise of marriage. Wherever the act complained of constitutes a violation of some legal right of the plaintiff, which always, in contemplation of law, causes injury, he is entitled to recover all damages which are the proximate and natural consequence of the wrongful act. That mental suffering and injury to the feelings would be ordinarily the natural and proximate result of knowledge that the remains of a deceased husband had been mutilated is too plain to admit of argument.

In *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759, where the defendant entered upon plaintiff's land, and dug up and removed the dead body of his child, it was held that plaintiff might recover compensation for the mental anguish caused thereby. It is true that in that case the court takes occasion to repeat the old saying that a dead body is not property, and makes the gist of the action the trespass upon plaintiff's land; but it would be a reproach to the law if a plaintiff's right to recover for mental anguish resulting from the mutilation or other disturbance of the remains of his dead should be made to depend upon whether in committing the act the defendant also committed a technical trespass upon plaintiff's premises, while everybody's common sense would tell him that the real and substantial wrong was not the trespass on the land, but the indignity to the dead. Order affirmed.⁵⁵

⁵⁵ Accord: *Green v. T. A. Shoemaker & Co.*, 111 Md. 69, 73 Atl. 688, 23 L. R. A. (N. S.) 667 (1909); *Simone v. Rhode Island Co.*, 28 R. I. 186, 66 Atl. 202, 9 L. R. A. (N. S.) 740 (1907); *Purcell v. St. Paul City Ry. Co.*, 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203 (1892). And compare *Sanderson v. Northern Pac. Ry. Co.*, 88 Minn. 162, 92 N. W. 542, 60 L. R. A. 403, 97 Am. St. Rep. 509 (1902). Contra: *Spade v. Lynn & B. R. Co.*, 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393 (1897); *Ward v. West Jersey & S. R. Co.*, 65 N. J. Law, 383, 47 Atl. 561 (1900). But compare this case with *Buchanan v. West Jersey R. Co.*, 52 N. J. Law, 265, 19 Atl. 251 (1890).

2. IN ACTIONS OF TORT

McDERMOTT v. SEVERE.

(Supreme Court of United States, 1906. 202 U. S. 600, 26 Sup. Ct. 709,
50 L. Ed. 1162.)

Action by Charles E. Severe, by his next friend, against Allan L. McDermott, as receiver of the City & Suburban Railway of Washington, to recover damages for personal injuries. A judgment of the Supreme Court of the District of Columbia, in favor of plaintiff having been affirmed by the Court of Appeals (25 App. D. C. 276), the defendant brings error.

Mr. Justice DAY delivered the opinion of the court:⁵⁶ * * * It is further urged that the court erred in instructing the jury upon the question of damages. Upon this point the court said: "The jury are instructed that, if they find a verdict for the plaintiff, they should render a verdict in his favor for such a sum (not exceeding the amount claimed in the declaration) as, in their judgment, will reasonably compensate him for the pain resulting from the injury and from the loss of his leg; for the inconvenience to which he has been put, and which he will be likely to be put, during the remainder of his life, in consequence of the loss of his leg; for the mental suffering, past and future, which the jury may find to be the natural and necessary consequence of the loss of his leg, and for such pecuniary loss, as the direct result of the injury, which the jury may find from the evidence that he is reasonably likely to sustain hereinafter in consequence of his being deprived of one of his legs."

The court's attention was not called to any particular in which this charge, which covers a number of elements of damages, was alleged to be wrong; only a general exception was taken to the charge as given in this respect. It has been too frequently held to require the extended citation of cases, that an exception of this general character will not cover specific objections which, in fairness to the court, ought to have been called to its attention, in order that, if necessary, it could correct or modify them. A number of the rules of damages laid down in this charge were unquestionably correct; to which no objection has been or could be successfully made. In such cases it is the duty of the objecting party to point out specifically the part of the instructions regarded as erroneous. *Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72, 86, 39 L. Ed. 624, 629, 15 Sup. Ct. 491.

⁵⁶ Part of the opinion is omitted and the statement of facts is rewritten

It is now objected that to permit a recovery for a pecuniary loss, as covered in the instructions, would allow the infant plaintiff to recover compensation for his time before as well as after he has reached his majority; and that, during infancy, his father is entitled to recover any wages he might earn. If the defendant wished the charge modified in this respect, he should have called the attention of the court directly to this feature. The charge in this respect was general, permitting a recovery for a pecuniary loss directly resulting from the injury. It would be very unfair to the trial court to keep such an objection in abeyance, and urge it for the first time in an appellate tribunal.

Furthermore, an objection is taken to the charge as to mental suffering, past and future. It is objected that this instruction permits a recovery for future humiliation and embarrassment of mind and feelings because of the loss of the leg. But we find no objection to the charge as given in this respect. The court said: "The jury are to consider mental suffering, past and future, found to be the necessary consequence of the loss of his leg." Where such mental suffering is a direct and necessary consequence of the physical injury, we think the jury may consider it. It is not unlikely that the court might have given more ample instruction in this respect, had it been requested so to do. But what was said limited the compensation to the direct consequences of the physical injury.

An instruction of this character was sustained in *Washington & G. R. Co. v. Harmon*, 147 U. S. 584, 37 L. Ed. 289, 13 Sup. Ct. 557. That there might be more or less continuous mental suffering directly resulting from a maiming of the plaintiff's person in an injury of this character was probable, and, where the jury was limited to that which necessarily resulted from the injury, we think there can be no valid objection or just ground of complaint. Of a charge of this character, in *Kennon v. Gilmer*, 131 U. S. 22, 26, 33 L. Ed. 110, 112, 9 Sup. Ct. 696, Mr. Justice Gray, speaking for this court, said: "But the instruction given only authorized them, in assessing damages for the injury caused by the defendants to the plaintiff, to take into consideration 'his bodily and mental pain and suffering, both taken together' ('but not his mental pain alone'), and such as 'inevitably and necessarily resulted from the original injury.' The action is for an injury to the person of an intelligent being, and when the injury, whether caused by willfulness or by negligence, produces mental as well as bodily anguish and suffering, independently of any extraneous consideration or cause, it is impossible to exclude the mental suffering in estimating the extent of the personal injury for which compensation is to be awarded. The instruction was in accord with the opinions of this court in similar cases." We find no error in the charge in this respect.

As to the alleged error in charging the jury that damages could not be recovered in excess of the sum claimed in the declaration, the court was careful to say to the jury that the sum claimed should not be taken as a criterion to act upon, but that it was only a limit, beyond which they could not go. We cannot see how the plaintiff in error was prejudiced by this instruction. The judgment of the Court of Appeals is affirmed.

3. IN ACTIONS ON CONTRACT

WRIGHT v. BEARDSLEY.

(Supreme Court of Washington, 1907. 46 Wash. 16, 89 Pac. 172.)

Action by Samuel Wright and wife against C. A. Beardsley and others to recover damages for the improper burial of a deceased child. There was a verdict and judgment for plaintiff for \$2,510, and defendants appeal.

MOUNT, J.⁵⁷ * * * The complaint alleged, in substance, that the plaintiffs were husband and wife; that the defendants were copartners doing business as undertakers in the city of Aberdeen; that on December 12, 1905, plaintiffs lost their infant child, and contracted with defendants to bury the body in a decent, respectable manner, according to the usual customs and usage in performing burials; that, in pursuance of the agreement, defendants took the said body and deposited it in a grave which was then used as the grave of another child, and left the body in a rough coffin without a box and within six inches of the surface of the ground, and on top of the coffin of another child; that after said pretended burial, and without knowledge of the manner of said burial, plaintiffs paid defendants the charges therefor; that, by reason of the failure of defendants to perform their duties under said contract, plaintiffs have been damaged and have been caused to suffer great mental anguish, to their damage in the sum of \$5,000. The prayer was for that amount.

The defendants interposed a demurrer to this complaint, upon the grounds that there was a defect of parties plaintiff and defendant, and that the complaint fails to state facts sufficient to constitute a cause of action. This demurrer was overruled. Defendants then filed an answer, admitting that plaintiffs were husband and wife, that defendants were copartners in the undertaking busi-

⁵⁷ Part of the opinion is omitted and the statement of facts is rewritten.

ness, and that they entered into an agreement to bury plaintiffs' deceased child, but denied all the other allegations of the complaint. As a separate defense, the defendants alleged that they agreed with the plaintiffs to furnish a certain coffin and bury the body of the infant cheaply and temporarily in a lot used for the burial of stillborn infants, and that defendants fully and completely performed the said agreement, and that thereafter the body of said infant was exhumed by plaintiffs, in the presence of one of the defendants, and, at said time, with full knowledge of the manner of said burial, the plaintiffs expressed complete satisfaction, and the body was thereupon reinterred in the same grave.

At the close of plaintiffs' evidence, the defendants moved for a directed verdict upon the ground that the evidence was insufficient to sustain a judgment. This motion was denied by the court. Thereafter the court instructed the jury to the effect that, if the jury found for the plaintiffs, they might award plaintiffs actual damages for mental suffering. After verdict the defendants moved for a new trial upon the statutory grounds. This motion was also denied.

It is first contended by appellants that there is a defect of parties plaintiff, but, in view of the allegations in the complaint and the admissions in the answer that the plaintiffs are husband and wife, and that the defendants are copartners, there seems to be no merit in this contention. The persons who are the lawful custodians of a deceased body may maintain an action for its desecration. *Dunn & Co. v. Smith* (Tex. Civ. App.) 74 S. W. 576; *Koerber v. Patek*, 102 N. W. 40, 123 Wis. 453, 68 L. R. A. 956. The mother and father certainly may join in such an action.

The questions whether the complaint states a cause of action, whether the evidence was sufficient to go to the jury, and whether the court erred in instructing the jury that damages might be given for mental anguish of the plaintiffs, are all based upon the same contention, viz., that the action is for damages for a breach of contract, and that mental anguish is not a proper element of damage in such cases. These questions may therefore all be considered together. While it is true that the complaint alleges that a contract was entered into, and that by reason of the failure of defendants to perform their duty under the contract plaintiffs have been damaged, etc., still the facts stated in the complaint and testified to by the plaintiffs show that the action is for a wrong against the feelings of the plaintiffs inflicted by a wrongful and improper burial of their dead; in other words, a tort or injury against the person. In cases of this character, the rule has frequently been applied that damages may be had for mental suffering. *Dunn v. Smith*, *supra*; *Koerber v. Patek*, *supra*; *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St.

Rep. 370; *Burney v. Children's Hospital*, 169 Mass. 57, 47 N. E. 401, 38 L. R. A. 413, 61 Am. St. Rep. 273; *Foley v. Phelps*, 37 N. Y. Supp. 471, 1 App. Div. 551.

In the case of *Koerber v. Patek*, supra, the court said: "Doubtless other illustrations might be suggested, but these suffice to satisfy us that there is neither solecism nor unreason in the view that the right of custody of the corpse of a near relative for the purpose of paying the last rites of respect and regard is one of those relative rights recognized by the law as springing from the domestic relation, and that a willful or wrongful invasion of that right is one of those torts for which damages for injury to feelings are recoverable as an independent element." In the case of *Larson v. Chase*, supra, the court said: "Wherever the act complained of constitutes a violation of some legal right of the plaintiff, which always, in contemplation of law, causes injury, he is entitled to recover all damages which are the proximate and natural consequence of the wrongful act. That mental suffering and injury to the feelings would be ordinarily the natural and proximate result of knowledge that the remains of a deceased husband had been mutilated is too plain to admit of argument."

It is true that the cases above quoted from are cases where the deceased body had been wrongfully mutilated, but the principle there discussed applies as well to a case such as the one at bar, where the wrong consists of the manner of burial. *Dunn v. Smith*, supra. Where one person agrees to give a dead body decent burial, and under such agreement obtains possession of the body, and in violation of his duty casts the body by the way, or wrongfully mutilates it, or disposes of it, or deposits it in a grave without covering, in such a manner as to cause the relatives or persons charged with its decent sepulture to naturally suffer mental anguish, it would shock the sensibilities to hold that there was no remedy for such a wrong. We are therefore of the opinion that the trial court did not commit error in overruling the demurrer, or in denying defendants' motion for a nonsuit, or in instructing the jury that plaintiffs were entitled to recover actual damages for injury to the feelings.

Appellants next contend that the court erred in refusing the motion for new trial. This motion was based upon several grounds which in all probability will not arise upon a new trial, and which we shall not therefore discuss. We are clear that this motion should have been sustained, upon the ground that the verdict was excessive, so much so as to show passion and prejudice on the part of the jury. * * *

We are satisfied that a verdict for \$2,510 is entirely out of proportion to the actual injury sustained. It is somewhere between five and ten times more than it ought to be, and indicates that the jury, for some reason—no doubt in part by the mother's tears

—were induced by passion or prejudice to render a verdict in the nature of punitive damages against the appellants. The judgment is therefore reversed, and the cause remanded for a new trial.

MENTZER v. WESTERN UNION TEL. CO.

(Supreme Court of Iowa, 1895. 93 Iowa, 752, 62 N. W. 1, 28 L. R. A. 72, 57 Am. St. Rep. 294.)

Action by J. D. Mentzer against the Western Union Telegraph Company to recover damages for the failure of defendant to deliver a telegram notifying plaintiff of the death of his mother, whereby he was prevented from attending her funeral. There was verdict and judgment for plaintiff for \$100, and defendant appeals.

DEEMER, J.⁵⁸ * * * On the 11th day of April, 1892, one H. Dorn delivered to the defendant, at Creston, Ohio, to be transmitted to plaintiff, at Cedar Rapids, Iowa, the following telegraphic message: "Creston, Ohio, 11, 1892. To J. D. Mentzer, Cedar Rapids, Iowa. Mother dead. Funeral Wednesday. Answer if coming or not. H. Dorn." That Dorn paid the regular charges for transmitting the same, and, at the time of the delivery of the message, informed defendant's employé in charge of the office at Creston that it was plaintiff's mother who was dead. That the message reached defendant's office at Cedar Rapids at 9:16 a. m., April 11, 1892, but, through the negligence and carelessness of defendant's employés, was not delivered until 9 p. m., April 13th. The plaintiff inquired at defendant's office at Cedar Rapids at about 7 o'clock in the evening of April 11th, and was informed there was nothing there for him. It is shown beyond dispute that plaintiff's mother died at Creston, Ohio, on April 11, 1892, and was buried on the 13th, and that, by reason of the failure of defendant to deliver the message informing plaintiff of her death, he was prevented from attending her funeral. * * *

We have, then, the question as to whether damages for mental suffering can be recovered in actions of this kind, independent of any physical injury, where the company is advised of the character of the message, and negligently fails to deliver it. This question has been variously decided by the different courts of the country, but, up to this time, is an open one in this state. * * *

The general rule which has come down to us from England, no doubt, is that mental anguish and suffering resulting from mere negligence, unaccompanied with injuries to the person, cannot be made the basis of an action for damages. See *Lynch v. Knight*,

⁵⁸ Part of the opinion is omitted and the statement of facts is rewritten.

9 H. L. Cas. 577; *Hobbs v. Railroad Co.*, L. R. 10 Q. B. 122. And doubtless this is the rule of law to-day in all ordinary actions, either *ex contractu* or *ex delicto*. But it must be remembered that there are exceptions to the rule, and that the telegraph, as a means of conveying intelligence, is comparatively a new invention. * * *

Somewhat akin is it to a common carrier, in this: that they are both carriers, and must serve all alike; but the carrier transports persons or goods, while the telegraph conveys intelligence. The very object of the invention is to quickly convey information from one to another, upon which that other may act. It is a public use, and for that reason eminent domain may be exercised in its behalf, and is engaged in a business affecting public interests to such an extent that the state may regulate the charges of companies engaged in the business. It is not an insurer of the accuracy or of the delivery of messages intrusted to it, but it is so far a common carrier as to be bound to serve all people alike, and to exercise due care in the discharge of its public duties. Nor can it provide by contract for exemption from liability from the consequences of its own negligence. Enough has been stated to show that it owes a duty to all whom it attempts to serve, independent of the contractual one entered into when it receives its messages. Telegraph companies are held, then, to the exercise of due care, and for negligence, either in sending or delivering messages, are liable to any person injured thereby for all the damages he may sustain.

We have stated these rules in order to show that one who is injured by their neglect of duty may maintain an action, either *ex contractu* or *ex delicto*, for the injuries sustained. The rule, no doubt, is as announced by Judge Cooley in his work on Torts, at page 104 et seq.: "In many cases an action, as for tort, or an action for a breach of contract, may be brought by the same party on the same state of facts. This at first may seem in contradiction to the definition of a tort as a wrong unconnected with contract, but the principles which sustain such actions will enable us to solve the seeming difficulty. * * * There are also, in certain relations, duties imposed by law, a failure to perform which is regarded as a tort, though the relations themselves may be formed by contract covering the same ground. * * * Thus, for breach of the general duty imposed by law, because of the relation one form of action may be brought, and for the breach of contract another form of action may be brought." * * *

Under all known rules of law, plaintiff is entitled to some damages. Defendant insists they are simply nominal, and plaintiff contends he has suffered acute and actual damages, for which he should be compensated. The general rule of damages for breach of contract comes down to us from the opinion of *Hadley v. Baxendale*, 9 Exch. 341. * * *

In actions for tort the rule is much broader. The universal and cardinal principle in such cases is that the person injured shall receive compensation commensurate with his loss or injury, and no more. This includes damages not only for such injurious consequences as proceed immediately from the cause which is the basis of the action, but consequential damages as well. These damages are not limited or affected, so far as they are compensatory, by what was in fact contemplated by the party in fault. He who is responsible for a negligent act must answer "for all the injurious results which flow therefrom, by ordinary, natural sequence, without the interposition of any other negligent act or overpowering force." Whether the injurious consequences may have been "reasonably expected" to follow from the commission of the act is not at all determinative of the liability of the person who committed the act to respond to the person suffering therefrom. As said in *Stevens v. Dudley*, 56 Vt. 158, "it is the unexpected, rather than the expected, that happens in the great majority of cases of negligence."

Under all the authorities, it was the duty of the defendant to transmit and deliver messages intrusted to it without unreasonable delay; and, in failing to do so, it becomes liable for all damages resulting therefrom. *Cooley, Torts*, 646, 647; *Gray, Commun. Tel.* §§ 81, 82, et seq.; *Whart. Neg.* § 767. That a person is entitled to at least nominal damages for an infraction of the duty imposed upon a telegraph company is conceded. And it must also be conceded that every person desires to attend upon the obsequies of his near relations. And when, able and anxious to attend, he is, through the negligence of a telegraph company, not notified of their death in time to attend the funeral, he naturally and almost inevitably suffers mental pain and anguish. No man is so depraved but that he yet remembers his mother, and, when able, will pay her the last respect that is her due.

In the case at bar it is established that defendant knew the nature of the intelligence it was to transmit, and also knew that, if it was not delivered within a reasonable time, plaintiff was likely to be greatly pained on account not only of not knowing of the death of his mother until she was placed under the ground, but also because of his inability to attend the funeral on account of the delay. That the defendant should reasonably have contemplated such results, under the rule laid down in *Hadley v. Baxendale*, is clear.

But it is insisted that damages for mental suffering, although contemplated by the parties, cannot be recovered for mere breach of contract. That such is the general rule announced by the courts, and that it is the rule now with reference to all ordinary contracts, must be conceded. But it must be remembered that this rule grew up at a time when there was no thought of the

transmission of intelligence by electricity. Breaches of contract, such as the one in question, were unknown to the common law. The business of telegraphy has grown up within comparatively recent years. But must we say that the law furnishes no remedy because no case of the kind was known to the common law? If so, such law is no longer applicable to our present conditions. Regard must be had, too, to the subject-matter of the contract. The message does not relate to property. In such cases for breach of contract the law affords adequate compensation. But it does relate to the feelings, the sensibilities, aye, sometimes even to the life, of the individual. It does not affect his pocketbook seriously, but it does relate to his feelings, his emotions, his sensibilities,—those finer qualities which go to make the man. Shall we say that in one case the law affords compensation, and in the other it does not? Instead of goods which are conveyed by the defendant, it is intelligence,—thought. If defendant were a common carrier of goods, it would be liable for all damages sustained by reason of its breach of contract to deliver them within a reasonable time.

But it is said no damages can be recovered for failure to deliver intelligence, beyond the amount actually paid for the message, or nominal damages, although the addressee may endure the greatest of mental pangs, notwithstanding the fact that such suffering was in the contemplation of the parties at the time the contract was made. Of course, every breach of contract is likely to cause some pain, but most of these contracts relate to property and pecuniary matters, and in such case the law furnishes what has always been held to be an adequate remedy for the pecuniary loss sustained. Mental suffering has never been considered as within the contemplation of the parties at the time the contract is entered into, and recovery cannot be had therefor. But few contracts have direct relation to the feelings and sensibilities of the parties entering into them, and the pain growing out of the ordinary breach of contracts relating to property is entirely different from that suffered from a death message. *Suth. Dam.* § 980.

We find a well-recognized exception to the general rule that damages cannot be had for mental anguish in cases of breach of contract, in the action for breach of promise of marriage, and the reason for this exception is quite applicable here. In such cases the defendant, in making his contract, is dealing with the feelings and emotions. The contract relates almost wholly to the affections, and one is not allowed to so trifle with another's feelings. He knows at the time he makes the contract that if he breaks it the other will suffer great mental pain, and the courts, without exception, have allowed recovery in such a case. See *Holloway v. Griffith*, 32 Iowa, 409, 7 Am. Rep. 208; *Royal v. Smith*, 40 Iowa, 615.

The distinction we have pointed out is well stated in 1 *Suth. Dam.* § 92. Other exceptions have sometimes been made, which we need not further refer to. As said in the case of *Wadsworth v. Telegraph Co.*, 86 *Tenn.* 695, 8 *S. W.* 574, 6 *Am. St. Rep.* 864: "These illustrations serve the purpose of showing that in the ordinary contract only pecuniary benefits are contemplated by the contracting parties, and that, therefore, the damages resulting from such breach of contract must be measured by pecuniary standards, and that, where other than pecuniary benefits are contracted for, other than pecuniary standards should be applied in the ascertainment of damages flowing from the breach." * * *

Reverting now to the damages which may be allowed if the action is treated as *ex delicto*, and to the broader rule of damages in cases of tort, we find that, in very many of these actions, damages are recoverable for mental anguish, some of which we will refer to hereafter. It is conceded by appellant's counsel that such damages may in certain cases be recovered, but they insist that they are never recoverable unless accompanied by some physical injury. It seems to us that, when it is conceded that mental suffering may be compensated for in actions of tort, the right of plaintiff to recover in this case is established. Let us look to some of the cases authorizing recovery in such cases, and see if there are no analogies.

Damages for injuries to the feelings are given, though there are no physical injuries, where a person is wrongfully ejected from a train. *Shepard v. Railway Co.*, 77 *Iowa*, 54, 41 *N. W.* 564. In actions for slander and libel. *Terwilliger v. Wands*, 17 *N. Y.* 54, 72 *Am. Dec.* 420. For malicious prosecution. *Fisher v. Hamilton*, 49 *Ind.* 341. For false imprisonment. *Stewart v. Maddox*, 63 *Ind.* 51. For crim. con. and seduction, and for assault. So damages for injured feelings were allowed where a conductor kissed a female passenger against her will. *Craker v. Railway Co.*, 36 *Wis.* 657, 17 *Am. Rep.* 504. So likewise, it has been held that the removal of the body of a child from the lot in which it was rightfully buried, to a charter plot, gives the parent a right to recover for injury to his feelings. *Meagher v. Driscoll*, 99 *Mass.* 281, 96 *Am. Dec.* 759. And a widow may recover for such suffering and nervous shock, against the person who unlawfully mutilates the dead body of her husband, although no actual pecuniary damages are alleged or proven. *Larson v. Chase*, 47 *Minn.* 307, 50 *N. W.* 238, 14 *L. R. A.* 85, 28 *Am. St. Rep.* 370. See, also, *Suth. Dam.* § 979, and authorities cited for kindred cases.

The wrongs complained of in these cases all directly affected the feelings, and injury thereto proximately resulted. But not more so than in the case at bar, where the injury to the feelings is apparent, and suffering necessarily followed. This rule of ne-

cessity applies where the feelings are directly affected by the nature of the wrong complained of. It has no application to such mental suffering as indirectly results from the commission of every tort. * * *

In the quite recent case of *Shepard v. Railway Co.*, 77 Iowa, 58, 41 N. W. 564, we * * * held that damages for mental suffering are recoverable, although there was no physical pain or injury. In that case we said: "If these things [wounded feelings] may be considered in connection with physical suffering, in estimating actual damages, we know no reason which forbids their being considered in the absence of physical suffering. * * *"

In the case of *Curtis v. Railway Co.*, 87 Iowa, 622, 54 N. W. 339, this court squarely held that damages might be recovered for mental pain and suffering, although the damages for physical injury were merely nominal; and further held that such damages were compensatory, and not punitive. * * * In the case of *Stone v. Railroad Co.*, 47 Iowa, 88, 29 Am. Rep. 458, it was held that the action in that case, owing to its peculiar facts, was an action for breach of contract; and that damages for mental suffering were not recoverable, and in this case it is said: "Insult and abuse accompanying a breach of contract cannot affect the amount of recovery in such actions. If the action is based upon a wrong, the jury are permitted to consider injury to feelings, and many other matters which have no place in actions to recover damages for breach of contracts"—citing *Walsh v. Railway Co.*, 42 Wis. 23, 24 Am. Rep. 376. It is enough to say here that the action at bar is *ex delicto*, or that damages may be recovered as if it were, under our system of Code pleading. * * *

From these cases it is apparent that in actions of tort this court has frequently announced the rule that damages for mental suffering may be recovered, although there is no physical injury. And, if this be so, why is not this a case where they ought to be allowed? It cannot be possible that here is a legal wrong for which the law affords no remedy. The wrong is plain, the injury is apparent, and we think the law affords a remedy, for compensatory damages, under the rules above given. It must not be understood to follow that, in all actions *ex delicto*, damages for mental suffering may be allowed. There must be some direct and proximate connection between the wrong done and the injury to the feelings, to justify a recovery for mental anguish. But, when there is this connection so manifest as in the case at bar, we think such damages ought to be allowed. It is very appropriately said, however, in one of the cases which has been cited, that "great caution should be used in the trial of cases like this, as it will be so easy and natural to confound the corroding grief occasioned by the loss of a parent or other relative with the disappointment and regret occasioned by the fault or neglect of the

company, for it is only the latter for which recovery may be had; and the attention of juries might well be directed to this fact."

It is not necessary for us to determine on which theory damages for mental anguish are recoverable. If we find they are recoverable, either in an action for breach of contract, or by reason of a breach of public duty, then the instruction given by the lower court was correct, and should be sustained. It will be noticed that, in some of the cases holding to a contrary doctrine from that here announced, recovery was denied because of the form of the action; that is to say, it was held that the action in the particular case was for breach of contract, and that damages for mental suffering were not recoverable in such an action. Whether they would be recoverable in actions *ex delicto* or not was not determined. Let us look for a moment to some of the objections urged to such a rule as we have announced.

First. It is said that such suffering is speculative and remote. We have, as we think, answered this by showing that in actions of this kind it is direct and proximate to the wrong complained of.

Second. It is urged that such damages are sentimental, are vague and shadowy, and that there is no standard by which an injury can be justly compensated or approximately measured. This objection is answered if we find any case in which such damages are allowed, for if they may be allowed in one kind of case they may in all, so far as this objection is concerned. We have already seen numbers of cases, both from this and other states, wherein it is held that damages for mental suffering, independent of physical injury, may be recovered. It is conceded by counsel that damages can be recovered for mental suffering when accompanied by physical pain or bodily suffering. If this be true, then let us ask how they can be any more accurately measured when so accompanied than when not. When it is once conceded that mental anguish can be considered, and compensation made therefor, then the objection last urged falls to the ground.

Third. It is said there is no principle on which such damages can be recovered. We have endeavored to show, to the best of our ability, that there is abundant authority to justify a recovery in such cases.

Fourth. It is contended that the rule opens up a vast and fruitful field for speculative litigation. We have endeavored to so guard and limit the rule that there may be no mistaking its operation and effect. If recovery is for breach of the contract, then it can only be had because of the subject-matter—the fact that it is intelligence that is transmitted, and the feelings only affected. And, if the recovery is had because it is a tort, then a somewhat similar limitation is made, which we have tried to make apparent. If, as thus limited, the rule opens up a vast and fruitful field of litigation, it is only because telegraph companies fail to do their

duty. We cannot think that a rule which will tend to make telegraph companies more careful in the matter of delivering their messages will be fraught with such fearful results as counsel imagine. The single, plain duty of a telegraph company is to make transmission and delivery of messages intrusted to it with promptitude and accuracy. When that is done its responsibility is ended. When it is omitted, through negligence, the company should answer for all injury resulting, whether to the feelings or the purse, one or both, subject to the proviso that the injury must be the natural and direct consequence of the negligent act. We cannot conceive of any danger in such a rule. It seems to us to be in accord with the enlightened spirit of modern jurisprudence, and that in actual practice no evil can result therefrom. Juries may be prone, in cases of this kind, to place their estimates high; but the judge is ever present, with a restraining power, ample to prevent unconscionable and unjust verdicts. * * * The judgment is affirmed.⁵⁹

SUMMERFIELD v. WESTERN UNION TEL. CO.

(Supreme Court of Wisconsin, 1894. 87 Wis. 1, 57 N. W. 973, 41 Am. St. Rep. 17.)

Action by Fred G. Summerfield against the Western Union Telegraph Company for damages for delay in transmitting a message. Plaintiff resided on a farm about 10 miles from the village of Iron River, Wis. His mother lived at Lisbon, N. D., with plaintiff's brother J. W. Summerfield. Defendant had an office at each of these places. October 23, 1892, J. W. Summerfield left at defendant's office at Lisbon a message addressed to plaintiff, care of Burt Clark, Iron River, reading as follows: "Mother is dying. Come immediately. J. W. Summerfield." The message was negligently delayed, and was not delivered to Clark until October 28, 1892, and plaintiff did not receive it until after noon of that day. Plaintiff's mother died on the 26th day of October. Plaintiff claimed that he would have gone to his mother's bedside had he received the telegram in due time, and that, by reason of his failing to receive the message until after his mother's death, he was deeply "mortified, grieved, hurt, and shocked, and suffered intense anguish of body and mind, and was thereby thrown into a state of nervous excitement and tremor, which rendered him sick, and impaired his health and strength, and that he still suffers from the effect of the same." Upon the trial, objection was made to the reception of any evidence under the complaint, be-

⁵⁹Accord: *Foreman v. Western Union Tel. Co.*, 141 Iowa, 32, 116 N. W. 724, 19 L. R. A. (N. S.) 374 (1909).

cause it did not state facts sufficient to constitute a cause of action, which objection was overruled, and exception was taken.

The court charged the jury, among other things, as follows: "If you find that the message, in the exercise of ordinary diligence, considering all the circumstances of the case, was unreasonably delayed, and that, if it had been delivered with reasonable promptness, the plaintiff could and would have responded thereto, and reached his mother before her death, and that plaintiff suffered mental pain from a sense of disappointment, sorrow, chagrin, or grief at being deprived of being at his mother's deathbed, your verdict should be for the plaintiff in such sum as will fairly compensate him for his mental suffering and damages, if any, to his nervous system, caused by the shock of such mental suffering." A verdict for the plaintiff for \$652.50 was rendered, and, from judgment thereon, defendant appealed.⁶⁰

WINSLOW, J. The exact question presented by the instruction of the court to the jury is whether mental anguish alone, resulting from the negligent nondelivery of a telegram, constitutes an independent basis for damages. At common law it was well settled that mere injury to the feelings or affections did not constitute an independent basis for the recovery of damages. Cooley, Torts, 271; Wood's Mayne, Dam. (1st Amer. Ed.) § 54, note 1. It is true that damages for mental suffering have been generally allowed by the courts in certain classes of cases. These classes are well stated by Cooper, J., in his learned opinion in the case of *Telegraph Co. v. Rogers*, 68 Miss. 775, 9 South. 823, 13 L. R. A. 859, 24 Am. St. Rep. 300, as follows: "(1) Where, by the merely negligent act of the defendant, physical injury has been sustained; and in this class of cases they are compensatory, and the reason given for their allowance is that the one cannot be separated from the other. (2) In actions for breach of the contract of marriage. (3) In cases of willful wrong, especially those affecting the liberty, character, reputation, personal security, or domestic relations of the injured party." To this latter class belong the actions of malicious prosecution, slander and libel, and seduction, and they contain an element of malice.

Subject to the possible exceptions contained in the second and third of the above classes, it is not believed that there was any case—certainly no well-considered case—prior to the year 1881, which held that mental anguish alone constituted a sufficient basis for the recovery of damages. In that year, however, the supreme court of Texas, in *So Relle v. Telegraph Co.*, 55 Tex. 308, 40 Am. Rep. 805, decided that mental suffering alone, caused by failure to deliver such a telegram as the one in the present case, was sufficient basis for damages. The principle of this case has been

⁶⁰ The statement of facts is rewritten.

followed with some variations, by the same court, in many cases since that decision, and its reasoning has been substantially adopted by the courts of last resort in the states of Indiana, Kentucky, Tennessee, North Carolina, and Alabama, in cases which are cited in the briefs of counsel. On the other hand, the doctrine has been vigorously denied by the highest courts in the states of Georgia, Florida, Mississippi, Missouri, Kansas, and Dakota, and by practically the unanimous current of authority in the federal courts. All of these cases will be preserved in the report of this case, and the citations need not be repeated here.

The question is substantially a new one in this state, and we are at liberty to adopt that rule which best commends itself to reason and justice. It is true that it has been held by this court, in *Walsh v. Railway Co.*, 42 Wis. 32, 24 Am. Rep. 376, that, in an action upon breach of a contract of carriage, damages were not recoverable for mere mental distress; but, as we regard this action as being in the nature of a tort action, founded upon a neglect of the duty which the telegraph company owed to the plaintiff to deliver the telegram seasonably, that decision is not controlling in this case. The reasoning in favor of the recovery of such damages is, in brief, that a wrong has been committed by defendant which has resulted in injury to the plaintiff as grievous as any bodily injury could be, and that the plaintiff should have a remedy therefor. On the other hand, the argument is that such a doctrine is an innovation upon long-established and well-understood principles of law; that the difficulty of estimating the proper pecuniary compensation for mental distress is so great, its elements so vague, shadowy, and easily simulated, and the new field of litigation thus opened up so vast, that the courts should not establish such a rule.

Regarding, as we do, the Texas rule as a clear innovation upon the law as it previously existed, we shall decline to follow it, and shall adopt the other view, namely, that for mental distress alone, in such a case as the present, damages are not recoverable. The subject has been so fully and ably discussed in opinions very recently delivered that no very extended discussion will be attempted here. We refer specially to the opinions in *Telegraph Co. v. Rogers*, 68 Miss. 775, 9 South. 823, 13 L. R. A. 859, 24 Am. St. Rep. 300; *Connell v. Telegraph Co.*, 116 Mo. 34, 22 S. W. 345, 20 L. R. A. 172, 38 Am. St. Rep. 575; *Telegraph Co. v. Wood*, 57 Fed. 471, 6 C. C. A. 432, 21 L. R. A. 706. See, also, Judge Lurton's dissenting opinion in *Wadsworth v. Telegraph Co.*, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864. In the last-named opinion the following very apt remarks are made: "The reason why an independent action for such damages cannot and ought not to be sustained is found in the remoteness of such damages, and in the metaphysical character of such an injury, considered apart from

physical pain. Such injuries are generally more sentimental than substantial. Depending largely on physical and nervous conditions, the suffering of one under precisely the same circumstances would be no test of the suffering of another. Vague and shadowy, there is no possible standard by which such an injury can be justly compensated, or even approximately measured. Easily simulated and impossible to disprove, it falls within all of the objections to speculative damages, which are universally excluded because of their uncertain character."

Another consideration which is, perhaps, of equal importance, consists in the great field for litigation which would be opened by the logical application of such a rule of damages. If a jury must measure the mental suffering occasioned by the failure to deliver this telegram, must they not also measure the vexation and grief arising from a failure to receive an invitation to a ball or a Thanksgiving dinner? Must not the mortification and chagrin caused by the public use of opprobrious language be assuaged by money damages? Must not every wrongful act which causes pain or grief or vexation to another be measured in dollars and cents? Surely, a court should be slow to open so vast a field as this without cogent and overpowering reasons. For ourselves we see no such reasons. We adopt the language of Gantt, P. J., in *Connell v. Telegraph Co.*, supra: "We prefer to travel yet awhile super antiquas vias. If, in the evolution of society and the law, this innovation should be deemed necessary, the legislature can be safely trusted to introduce it, with those limitations and safeguards which will be absolutely necessary, judging from the variety of cases that have sprung up since the promulgation of the Texas case."

It was argued that under chapter 171, Laws 1885, (Sanb. & B. Ann. St. § 1770b,) damages for injuries to feelings alone might be recovered. This law provides that telegraph companies shall be liable for all damages occasioned by failure or negligence of their operators, servants, or employés in receiving, copying, transmitting, or delivering dispatches or messages. We cannot regard this statute as creating, or intended to create, in any way, new elements of damage. Whether its purpose was to obviate the difficulties which were held fatal to a recovery in the case of *Candee v. Telegraph Co.*, 34 Wis. 471, 17 Am. Rep. 452, or to effect some other object, is not a question which now arises; but it seems clear to us that, had a radical change in the law relating to the kinds of suffering which should furnish a ground of damages been contemplated, the act would have expressed that intention in some unmistakable way. We see nothing in the law to indicate such intention.

Finally, it is said that verdicts for injuries to the feelings alone have been sustained in this court, and the following cases are

cited: *Wightman v. Railway Co.*, 73 Wis. 169, 40 N. W. 689, 2 L. R. A. 185, 9 Am. St. Rep. 778; *Craker v. Railway Co.*, 36 Wis. 657, 17 Am. Rep. 504; *Draper v. Baker*, 61 Wis. 450, 21 N. W. 527, 50 Am. Rep. 143. Without reviewing these cases in detail, it is sufficient to say that there was in all of them the element of injury or discomfort to the person, resulting either from actual or threatened force, and they cannot be relied upon as precedents for the allowance of damages for mental sufferings alone.

It follows from these views that the instruction excepted to was erroneous. Judgment reversed, and action remanded for a new trial.⁶¹

X. Aggravation and Mitigation of Damages ⁶²

FARRAND v. ALDRICH.

(Supreme Court of Michigan, 1891. 85 Mich. 593, 48 N. W. 628).

Action for libel. The libelous article which charged the plaintiff with gross immorality was published in a newspaper owned and published by defendants. There was verdict and judgment for plaintiff for \$1,000. Defendants bring error.

GRANT, J.⁶³ * * * The jury were instructed upon the measure of damages that plaintiff was entitled to recover for injury to her feelings, character, and reputation: for humiliation, shame, and disgrace which the publication brought upon her; and for illness of body and worry of mind. Defendants insist that the jury having acquitted the defendants of malice, and therefore of willfulness in the publication, mental suffering is not an element of actual damage. If this were the rule, one of the principal elements of damage would be excluded. If a virtuous young woman is entitled to no consideration for her injured feelings when she has been publicly charged with the grossest immorality, courts might as well deny her a cause of action. Nor do we think it was error to charge the jury that they might consider the effect that such a publication would have upon her in the future. Judgment affirmed. The other justices concurred.⁶⁴

⁶¹ See *Western Union Tel. Co. v. Ferguson*, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846 (1901), wherein the Supreme Court of Indiana, after reviewing the cases, repudiates the doctrine that damages for mental suffering can be recovered in actions for delay in the delivery of telegrams.

⁶² For discussion of principles, see *Hale on Damages* (2d Ed.) § 42.

⁶³ Part of the opinion is omitted and the statement of facts is rewritten.

⁶⁴ Aggravation of damages in actions for breach of marriage promise, see *Osman v. Winters*, post, p. 274.

GRONAN v. KUKKUCK.

(Supreme Court of Iowa, 1882. 59 Iowa, 18, 12 N. W. 748.)

Action to recover damages sustained by reason of an assault and battery committed by defendants upon the plaintiff. There was a verdict and judgment for plaintiff. Defendants appeal.

BECK, J.⁶⁵ The petition charges that the assault and battery were committed by both of the defendants, but the evidence shows that violence was used by Henry Kukkuck alone, and that the other defendant, his father, was present, encouraging the son and instigating the assault. The answer of the son pleads, as justification, that plaintiff, in the son's presence, pronounced a statement then made by the father a lie. * * *

The court directed the jury that no words used by plaintiff would justify the assault, but words of provocation used just before and at the time of the assault should be considered in mitigation of exemplary damages, and added to the instruction the following words: "But no words used by plaintiff to the defendants or either of them before the day of assault, or which came to their knowledge before that time, should be considered by you for any purpose." Provocation given at the time of the assault, or within a prior time so recent as to justify the presumption that the offence was committed under the influence of passion excited thereby, may be shown in mitigation of damages. But if time for reflection intervened after the provocation, it will not extenuate the violence. This is the settled rule of this state. *Thrall v. Knapp*, 17 Iowa, 468; *Ireland v. Elliott*, 5 Iowa, 478, 68 Am. Dec. 715. A provocation arising on a day prior to the assault cannot be shown in mitigation of damages, for the law presumes sufficient time intervened before the assault to allow the passions to subside and reason to regain control of the mind. The doctrine of the instruction sustains the ruling of the circuit court in excluding evidence of conversations and declarations of the plaintiff, alleged to have occurred prior to the day of the assault, which were offered in extenuation thereof.

The court directed that mental pain suffered by the plaintiff should be considered by them as an element of damages. Counsel for defendant insisted that, as there is no allegation and claim in the petition based upon mental pain suffered by plaintiff, he cannot recover therefor in this action. But as mental pain is the natural and inevitable result of personal injuries, damages therefor need not be specially claimed. * * *

An instruction was asked by the son to the effect that the denial of plaintiff that he had made statements derogatory to the char-

⁶⁵ Part of the opinion is omitted.

acter of defendant, whereby defendant was greatly provoked, should be considered in mitigation of damages. It seems to us that the fact assumed by the instruction, instead of extenuating defendant's assault, adds to the wrong. Surely the denial of the words ought to have the effect of abating defendant's feeling instead of exciting him to violence. * * * It is our opinion that the judgment of the circuit court ought to be affirmed.

XI. Reduction of Loss ⁶⁶

NASHVILLE, C. & ST. L. RY. v. MILLER.

(Supreme Court of Georgia, 1904. 120 Ga. 453, 47 S. E. 959, 67 L. R. A. 87.)

Action by J. T. Miller against the Nashville, Chattanooga & St. Louis Railway. There was judgment for plaintiff, and defendant brings error.

COBB, J.⁶⁷ Miller was a railway mail clerk, and received injuries as the result of a collision between the train upon which he was working and another train. He brought his action for damages against the railway company, and at the trial it was conceded that he was entitled to recover; the sole issue in the case being as to the amount of damages which should be awarded him. The jury returned a verdict for \$4,000. The defendant made a motion for a new trial upon numerous grounds, and complains that the court erred in overruling the same.

Error is assigned upon the following charge: "It is immaterial whether the government paid the plaintiff anything or not. That would not affect the rights of the plaintiff in this case to recover against the railroad company." Error is further assigned upon the refusal of the judge to give in charge a written request which was as follows: "Plaintiff admits in his testimony that he received from the government his regular salary during the time he did not work on account of his injury. This being so, I charge you that he cannot recover anything on this account for time lost, as claimed in his declaration."

King, an assistant division railway mail superintendent, testified as follows: Plaintiff "returned to work about June 10, 1903—about the time his year expired. If he had not gone back to work he would have been granted further time, but his pay would have stopped. The government pays them for one year when they are

⁶⁶ For discussion of principles, see Hale on Damages (2d Ed.) §§ 43-45.

⁶⁷ Part of the opinion is omitted.

disabled from work. This is done on physician's certificate for no period longer than sixty days consecutively, and not to exceed one year in total." The amount thus received by the plaintiff was \$1,400.

While the statute or regulation of the Post-Office Department under which this payment was made does not appear in the record, nor is it cited in the briefs of counsel, the payment was evidently made under the provisions of section 1424 of the postal laws and regulations, which reads as follows: "Whenever a railway postal clerk shall be disabled while in the actual discharge of his duties by a railroad or other accident beyond his power to control, he shall send to the division superintendent a certificate of his attending physician or surgeon, sworn to before an officer authorized to administer oaths, who has an official seal, setting forth the nature, extent, and cause of his disability, and the probable duration of the same; and such further evidence as to the character of the disability as may be necessary shall be furnished. The division superintendent will forward the certificate, with his recommendation, to the general superintendent of the railway mail service, who will submit the matter to the Postmaster-General, who may, in his judgment, the facts justifying such action, grant such disabled clerk leave of absence with pay for periods of not exceeding sixty days each, and not exceeding one year in all."

In considering whether the assignments of error under consideration are well taken, it is necessary to determine whether the payment referred to in the testimony was of such a character as to preclude the plaintiff from claiming compensation for lost time against the railway company. When one engaged in any calling or avocation from which he derives a pecuniary benefit is compelled to give up for a time the performance of his duties, as the result of an injury inflicted upon him by a wrongdoer, he is entitled, as a general rule, to demand compensation for the time thus lost at the hands of the wrongdoer who inflicted the injury. The general rule is that, where a wrongdoer causes time to be lost, he will not be heard to say that the person injured has suffered no pecuniary loss, because he has received, as a direct result of being injured, contributions which in amount aggregate more than what would have been earned during the time; nor will his liability be diminished to the extent of contributions which were less than what would have been earned. If, from motives of affection, philanthropy, or as the result of a contract, the plaintiff has received from one other than his employer any sums, the reception of which are directly attributable to the fact that he has been injured, the person causing the injury will not be allowed to urge the payment of such sums in mitigation of the damages claimed against him. Thus, it has been held that the damages will not be reduced

by any amount of insurance received in consequence of the wrongdoer's act. See *Western & Atlantic Railroad v. Meigs*, 74 Ga. 857 (5); *Cunningham v. R. Co.*, 102 Ind. 478, 1 N. E. 800, 52 Am. Rep. 683. Nor will the fact that medical attention and nursing have been rendered gratuitously preclude the injured party from recovering the value of such services (*Brosnan v. Sweetser*, 127 Ind. 1, 26 N. E. 555; *Pennsylvania Co. v. Marion*, 104 Ind. 239, 3 N. E. 874; *Varnham v. Council Bluffs*, 52 Iowa, 698, 3 N. W. 792), though it has been held that no recovery can be had for the value of services of this character rendered by members of the family, unless an agreement to pay for them be shown (*Goodhart v. R. Co.*, 177 Pa. 1, 35 Atl. 191, 55 Am. St. Rep. 705).

Ought the rule to be different where the employer, from motives of humanity, sympathy, business interest, and the like, pays to the injured employé, as a mere gratuity, for a given time, an amount which he would have been authorized to demand if he had performed the services of his employment, but which he had no right to demand unless the services were performed? In Texas it has been held that an amount paid by an employer, whether paid as the result of a direct undertaking or as a mere gratuity, cannot be pleaded in mitigation of damages. *Missouri Ry. Co. v. Jarrard*, 65 Tex. 560. In an Indiana Case the same rule was laid down, though it does not appear distinctly whether the payment was made as the result of a contract or as a gratuity. *Ohio R. Co. v. Dickerson*, 59 Ind. 317. It has been held by the courts of last resort of New York and Alabama, and by intermediate courts in Missouri, that where an employer pays to his employé, during the period of his disability, an amount which would be equal to his wages earned if he had been at work, the employé cannot seek compensation for lost time against a wrongdoer who causes the time to be lost. See *Drinkwater v. Dinsmore*, 80 N. Y. 390, 36 Am. Rep. 624; *Montgomery Ry. Co. v. Mallette*, 92 Ala. 210, 9 South. 363 (6); *Lee v. Western Union Tel. Co.*, 51 Mo. App. 375 (6), 385; *Ephland v. Ry. Co.*, 57 Mo. App. 147 (4), 160. A ruling to the same effect seems to have been made by *Lore, C. J.*, on circuit in Delaware. *Chielinsky v. Hoopes*, 1 Marv. (Del.) 273, 40 Atl. 1127 (6). None of these cases seem to lay any stress upon the question as to whether the payment was a gratuity, or was required by the contract of employment. The cases referred to above are cited in the different text-books on Damages. These text-writers do not agree as to what is the correct rule, but Mr. Watson distinctly takes the position that the sounder view is that which would preclude the wrongdoer from taking advantage of the employer's having, from reasons satisfactory to himself, paid to his injured employé an amount which would have been equal to his wages if he had performed the serv-

ices for the period during which he was disabled. See Watson's Dam. Pers. Inj. § 479; 1 Suth. Dam. (3d Ed.) § 158; 2 Rorer on R. R. p. 859; 1 Joyce on Dam. § 231; Voorhies on Dam. p. 61.
* * *

We think the view taken by Mr. Watson, and which seems also to be concurred in by Mr. Sutherland and Mr. Rorer, is sounder than that which appears to be approved by the other text-writers. The wrongdoer may show, in defense to a claim for lost time, that no time has been lost; and this, of course, is right and just, because, if no time has been lost, no compensation is due from anybody on account of lost time. But if time has been lost as the result of a tort, sound sense, common justice, and, it may be, public policy would demand that the tortfeasor be prohibited from making a defense founded upon the proposition that he has been guilty of a wrong—it may be, a grievous and outrageous wrong—but that some third person, not only not in sympathy with the wrongdoer, but despising him and his act, has, from some worthy motive, paid to the injured person an amount which, if it had come from the wrongdoer, would have equaled the damages which would have been assessed against him. There is nothing in the record to show that the government, in its contract of employment with railway postal clerks, stipulates for the payment of salary during periods of disability; and, so far as the record discloses, when such an employé is disabled from work, he cannot, as a matter of right, demand anything from the government by way of compensation during the period of disability. There is nothing in the testimony of the witness King to indicate that payments are made in such cases otherwise than as a matter of grace. If we look at the postal law or regulation above quoted, it is perfectly clear that the payment is a mere gratuity on the part of the government.

We are therefore not confronted in the present case with the necessity for deciding the question as to what would be the rule in the event that the injured employé, under his contract of employment, had a right to demand of his employer the amount which he would have earned as wages during the period he was disabled. On this question we now make no authoritative ruling, but we do rule that where an employer pays to an injured employé, as a matter of grace, the amount which he would have earned as wages if he had not been disabled, a wrongdoer who brings about the disability has no concern with this transaction between the employer and the employé, and the amount so paid is not to be regarded as in any sense compensation for lost time. Hence there was no error in the charge complained of, nor in refusing the instruction requested. * * * Judgment affirmed.

MURPHY v. CITY OF FOND DU LAC.

(Supreme Court of Wisconsin, 1868. 23 Wis. 365, 99 Am. Dec. 181.)

Trespass quare clausum. The questions here arose upon the instructions of the court, and its rulings as to evidence, which will sufficiently appear from the opinion. Verdict and judgment for the plaintiff; and the defendant appealed.

PAINE, J. The instruction that although placing the dirt on the plaintiff's lot may have improved its value, she would be entitled "to recover as damages what it would cost to remove the same," was erroneous. The fact that a trespass may have benefited the property invaded cannot constitute a complete defense. The party is always entitled to nominal damages, for the vindication and protection of his right. But beyond this, except in cases where exemplary damages may be given, he is confined to his actual damages. And this being so, the incorrectness of this instruction is apparent. It assumes that the jury might be satisfied from the evidence that the placing of the dirt on the lot was really a benefit to it, and increased its value, yet be required to give the plaintiff as damages what it would cost to remove it. Suppose a trespasser fills up a water lot, which, without being filled, is useless. Could the owner recover the cost of removing the dirt, as damages for the trespass, and at the same time leave it on the lot and enjoy the benefit of it? Suppose the trespasser should grade a lot which was previously inaccessible, and greatly increase its value by the grading. Could the owner take the advantage, and yet recover the cost of replacing the dirt in its former position? These illustrations seem sufficient to show that the rule given to the jury cannot be the proper rule of damages.

Undoubtedly the plaintiff would have been entitled to an instruction that in determining whether the lot was benefited or not, the jury should consider the uses and purposes to which she intended to devote it. But, in the absence of any thing to the contrary, it is to be presumed that they were properly instructed on this point, and gave to those circumstances proper consideration. And although, after doing so, they should come to the conclusion that the act complained of really caused no damage whatever, but on the contrary was a benefit to the plaintiff, they were required to give her arbitrarily as damages what it would cost her to remove the dirt.

I think, also, that the evidence as to whether the change made did not give the plaintiff's lot more frontage on the street, was improperly excluded. The plaintiff's counsel suggests that the defendant did not offer in this connection to show that such increased frontage was any advantage. But, if such was the actual effect upon the lot, the defendant had a right to show the fact. The jury would have had the right to apply their general knowl-

edge to the facts, and to have determined whether an increase of frontage was an advantage or not, without any direct expression of opinion, on the part of witnesses, upon the subject. The judgment is reversed, and the cause remanded for a new trial.

XII. Injuries to Limited Interests ⁶⁸

1. INTERESTS IN REAL PROPERTY IN POSSESSION

ELLIOTT v. MISSOURI PACIFIC RY. CO.

(Court of Appeals of Kansas, 1898. 8 Kan. App. 191, 55 Pac. 490.)

Action by Mattie E. Elliott and others against the Missouri Pacific Railway Company to recover damages for a loss by fire alleged to have been caused by a locomotive engine in the operation of defendant's railroad. Plaintiffs were tenants in possession of a farm, and the loss was the destruction of the meadow. There was judgment for defendant, and plaintiffs bring error.

McELROY, J.⁶⁹ * * * The plaintiffs in error, for a reversal of the judgment, rely upon the following assignments of error: * * *

Second. That the court erred in instructing the jury: "The plaintiffs' interest in said land was that of tenants for the season of 1894. The plaintiffs therefore cannot recover for any injury to the land itself, except so far as it may have affected the value of the use of the land for the term for which they had leased or rented it; and, if you find for the plaintiffs, the measure of their recovery will be the difference between the rental value of the land immediately before and immediately after the injury complained of, from March 1, 1894, to March 1, 1895, not exceeding the sum of \$480, the amount claimed in the petition."

This instruction correctly states the recoverable measure of damages upon the issues. * * * The judgment is affirmed.

⁶⁸ For discussion of principles, see Hale on Damages (2d Ed.) § 46.

⁶⁹ Part of the opinion is omitted and the statement of facts is rewritten.

2. INTERESTS OF MORTGAGOR AND MORTGAGEE

DELAWARE & A. TELEGRAPH & TELEPHONE CO. v.
ELVINS.

(Court of Errors and Appeals of New Jersey, 1899. 63 N. J. Law, 243,
43 Atl. 903, 76 Am. St. Rep. 217.)

Action by Elizabeth Elvins and others against the Delaware & Atlantic Telegraph & Telephone Company. There was judgment for plaintiffs, and defendant brings error.

VAN SYCKEL, J.⁷⁰ The declaration in this case charges the defendant company with breaking and entering the plaintiffs' close, and mutilating and cutting a number of shade and ornamental trees. The writ of error is prosecuted to review a judgment rendered for the plaintiffs in the trial court.

The plaintiffs owned the premises in fee on which the trees stood, subject to a mortgage. The defendant offered to prove that at the time of the alleged trespass the mortgage exceeded the value of the property, and that the mortgage had been subsequently foreclosed, and the premises sold pending this suit for much less than the mortgage debt. The court excluded this evidence, and instructed the jury to find a verdict for the plaintiff for the full amount of damage done. This is assigned for error. There can be no question that the owner of the fee in possession of real estate can maintain an action of trespass *quare clausum fregit*, although it is incumbered by a mortgage. It has also been the accepted law in this state that a mortgagee may maintain an action against the wrongdoer for an injury to the mortgaged premises. *Turrell v. Jackson*, 39 N. J. Law, 329; *Schalk v. Kingsley*, 42 N. J. Law, 32. The question of difficulty arises in ascertaining the rule of damages to be applied to such cases.

In the case now under review, the mortgagor, under the direction of the trial court, recovered compensation for the entire damage done by the trespass; and if the trespasser, after satisfying this judgment, is still subject to a suit by the mortgagee, in which a like amount may be recovered and made out of his property, it is obvious that great injustice has been done, and that the correct legal rule could not have been applied in this cause. But to the assumption that this liability exists on the part of the defendant to the mortgagee, and that the trial court is without power to furnish adequate protection to the trespasser, we cannot assent. In *Turrell v. Jackson*, 39 N. J. Law, 329, which was a suit by a second

⁷⁰ Part of the opinion is omitted.

mortgagee, Mr. Justice Dixon said that "the damages recoverable are to be measured by the injury to the mortgagee as a security, and, if it be doubtful whether the damages should not go to the first mortgagee, the court will exert its equitable powers to control the disposition of the fund so that no injustice may be done." In *Martin v. Insurance Co.*, 38 N. J. Law, 140, 20 Am. Rep. 372, it was declared that a like equitable power inhered in the trial court. In the later case of *Schalk v. Kingsley* a like remedy was accorded to the mortgagee, and it was adjudged that his damages were to be measured by the diminution in the value of his mortgage. When the mortgagee has instituted the prior suit, and recovered his damages, as he may, there is no difficulty about the rule. The owner may still maintain an action for the injury, and the trespasser can protect himself by giving in evidence the recovery by the mortgagee in mitigation of damages.

The owner has suffered damage to the full extent of the injury, but his claim has been satisfied pro tanto by payment to the mortgagee for his loss. But when the owner alone sues, and the case goes to trial upon the issue therein joined, the damages must be commensurate with the loss which falls upon the land by reason of the wrongful act. The damage committed upon the locus in quo is none the less because it is incumbered by a mortgage. The owner suffers to the extent of the entire loss. His premises are diminished in value to the full amount that will compensate for the injury. He is entitled to redeem the mortgage, and he may compel the wrongdoer to restore to him all that he has destroyed and deprived him of. In Massachusetts, by force and effect of the mortgage the legal estate vests at once in the mortgagee, and there the mortgagee recovers the full amount of damages done to the mortgaged premises. *Gooding v. Shea*, 103 Mass. 360, 4 Am. Rep. 563; *Byrom v. Chapin*, 113 Mass. 308; *Page v. Robinson*, 10 Cush. 99. The damages must be a recompense for the injury done to the property. *Thompson v. Banking Co.*, 17 N. J. Law, 480; *Vreeland v. Berry*, 21 N. J. Law, 183.

When the owner sues, the property injured is the tract of land; and when the mortgagee is the plaintiff, the property injured is his mortgage. In either case the entire injury to the property of the plaintiff is recovered. When the mortgagor of chattels prosecutes a stranger for taking the mortgaged goods, the established rule of this court is that he is entitled to recover their full value, without regard to the mortgage. He must recover all the damages that both mortgagor and mortgagee can claim, and it necessarily constitutes a legal bar to further recovery by either. *Luse v. Jones*, 39 N. J. Law, 707. No reason appears why a different rule shall prevail when the action is for trespass upon lands. The right both of the mortgagor and mortgagee to seek redress in a court of law being conceded, the equitable power

must reside in the court, in a just administration of the law, to control the judgment and proceedings in such a way that the amount recovered shall be appropriated to satisfy the demands of each in accordance with their respective rights, and with the rights of the defendant wrongdoer. There was therefore no error in this regard in the trial below.

A further objection to the legality of the proceedings on the trial is that William A. Elvins, a witness produced on the part of the plaintiffs, was permitted, notwithstanding objection to his evidence, to testify to the value of the shade trees. This evidence was excepted to by the counsel of the defendant on the ground that it was incompetent. * * * It certainly requires some special knowledge to be able to estimate the value of trees. * * *

In this case there was an entire absence of any fact to show that the opinion of the witness was entitled to be regarded as evidence. * * * It was error, therefore, in the trial court to allow the witness to testify as to the value of the trees as shade trees, and for that reason the judgment should be reversed.

3. JOINT INTERESTS

WAGGONER v. SNODY.

(Supreme Court of Texas, 1905. 98 Tex. 512, 85 S. W. 1134.)

BROWN, J.⁷¹ * * * One Wyatt was owner of two sections of land, which were situated in a pasture that belonged to P. S. Witherspoon, who rented the said land from Wyatt upon the agreement that Witherspoon was to pay annually the interest upon a portion of the purchase money due to the state of Texas and the taxes for each year. Witherspoon sold his pasture to Waggoner, and turned over his lease contract for two sections to Waggoner, who failed to pay the interest upon the purchase money due the state, as he had agreed to do, and Wyatt leased the land to W. F. Snody. Snody and one Ellerd were the owners of about 60 head of horses, which Snody turned into the said pasture. Snody owned about two-thirds of the horses, and Ellerd about one-third. The defendant C. I. Bedford was Waggoner's ranch boss, and had charge of the ranch. Harve Lawson was in the employ of Waggoner as a hand upon the ranch. Waggoner directed Bedford to have all horses and cattle which did not belong to Waggoner or Witherspoon turned out of the pasture, and, in

⁷¹ Part of the opinion is omitted.

pursuance of this direction, Lawson, with other hands, drove the horses of Snody out of the pasture. Some of the horses were lost, and others were injured, for which Snody brought this suit against Waggoner and Bedford for actual and exemplary damages, and upon the trial recovered of the defendants damages, both actual and exemplary, which judgment the Court of Civil Appeals affirmed. * * *

The defendants requested the court to give this charge, which was refused: "If you believe from the evidence that the plaintiff was only a part owner of said property, and that J. J. Ellerd and Reuben Ellerd, or either of them, was or were also part owners thereof, at the time the horses were put out of the pasture, then you can only find for the plaintiff such proportion of the damages, if you find any, as shall be equal to his interest in such horses; and, if there is no evidence tending to establish the amount of interest owned by each party, then you should find for the defendants." * * *

In view of another trial, we think it proper to express our views of the law upon the question presented for the refusal of the charge above copied. It is claimed for Snody that he was a bailee of the horses, and therefore entitled to recover in full for their value, or for damages to them. The Court of Civil Appeals do not find that he was a bailee, nor do they state facts from which such a conclusion can be drawn. Reference to the testimony shows that the only evidence which bears upon that question is that Snody himself stated that he had received the horses about five years previous to that time from Ellerd "on the shares," but no statement is made of any contract under which he claimed the right of possession, management, and control of the property. If Snody and Ellerd owned the horses jointly, and Snody was not entitled to the exclusive possession of them as a bailee, the charge above quoted should have been given. Where a joint owner of personal property brings a suit for damages thereto without joining the other owner or owners, he cannot recover the whole value of the property, or the damages which may have been inflicted upon it, but will be entitled to recover only his proportionate part of such value or damages, notwithstanding defendant has not pleaded the nonjoinder in abatement. *May v. Slade*, 24 Tex. 209; *Railroad v. Knapp*, 51 Tex. 592; *Dolson v. De Ganahl*, 70 Tex. 622, 8 S. W. 321; *Johnson v. Richardson*, 17 Ill. 304, 63 Am. Dec. 369; *Wheelwright v. Depeyster*, 1 Johns. (N. Y.) 485, 3 Am. Dec. 345; *Frazier v. Spear*, 2 Bibb. (Ky.) 386; *Webber v. Merrill*, 34 N. H. 208.

The plaintiff's right being to recover his proportionate part of the damages, in order to establish that right it devolved upon him to show with reasonable certainty the extent of his interest in the property. If Snody was the bailee of the property, then

he was entitled to recover for the entire damage done to the property by the acts of Waggoner's employes. *Masterson v. I. & G. N. Ry. Co.* (Tex. Civ. App.) 55 S. W. 577; *Harker v. Dement*, 9 Gill (Md.) 7, 52 Am. Dec. 670, and note on page 678; *Gillette v. Goodspeed*, 69 Conn. 363, 37 Atl. 973; *Woodman v. Nottingham*, 49 N. H. 393, 6 Am. Rep. 526; *Telegraph Co. v. Walker*, 72 Md. 454, 20 Atl. 1, 20 Am. St. Rep. 479. * * *

The judgments of the district court and Court of Civil Appeals are reversed, and the cause remanded.⁷²

⁷² For the report of this case in the Court of Civil Appeals, see 82 S. W. 355 (1904).

Compensatory Damages.

BONDS, LIQUIDATED DAMAGES, AND ALTERNATIVE CONTRACTS

I. Liquidated Damages and Penalties—Rules of Construction¹

MERICA v. BURGETT.

(Appellate Court of Indiana, 1905. 36 Ind. App. 453, 75 N. E. 1083.)

Action by John W. Burgett against Alex. Merica and another for breach of contract. The contract provided for the sale of a banking business conducted by the defendants, and contained a stipulation that defendants would not start another bank in the town as long as plaintiff owned the bank sold to him under the contract. The contract contained the additional stipulation "that a failure of either party to fulfill this contract forfeits to the other party one thousand (\$1,000) dollars." There was a breach of the contract by the defendant Merica. From a judgment for plaintiff for \$500, defendants appeal, and plaintiff assigns cross-errors.

MYERS, P. J.² * * * Is the stipulated sum of money in the contract to be regarded as liquidated damages or as a penalty? So far as we have been able to discover from adjudicated cases, no positive rules have been deduced as an absolute guide in all cases by which it may be determined whether a contract providing for a stipulated sum for its breach is to be regarded as a penalty or liquidated damages, for it has been held to so designate a fixed sum in an agreement as a penalty or liquidated damages will not be conclusive to show that it should be thus regarded. *Whitfield v. Levy*, 35 N. J. Law, 149; *Noyes v. Phillips*, 60 N. Y. 408; *Keck v. Bieber*, 148 Pa. 645, 24 Atl. 170, 33 Am. St. Rep. 846; *Wilhelm v. Eaves*, 21 Or. 194, 27 Pac. 1053, 14 L. R. A. 297. Therefore it may be said that the answer to the question here propounded will be the conclusion reached upon determining the intention of the parties from the whole case and tenor of the contract, aided by a few established general principles for inferring such intention. It has been held that "where the sum named is declared to be fixed as liquidated damages is not greatly disproportionate to the loss that may result from a breach, and the damages are not measurable by any exact pecuniary standard, the sum designated will be deemed to be stipulated

¹ For discussion of principles, see *Hale on Damages* (2d Ed.) §§ 48-60.

² Part of the opinion is omitted and the statement of facts is rewritten.

damages." *Jaqua v. Headington*, 114 Ind. 309, 16 N. E. 527; *Bird v. St. John's Episcopal Church*, 154 Ind. 138, 147, 56 N. E. 129; *Chicago & S. E. Ry. Co. v. McEwen*, 35 Ind. App. 251, 71 N. E. 926; *Benner v. Magee*, 34 Ind. App. 176, 70 N. E. 823; *Kelso v. Reid*, 145 Pa. 606, 23 Atl. 323, 27 Am. St. Rep. 716; *Waggoner v. Cox*, 40 Ohio St. 539; *Streeter v. Rush*, 25 Cal. 67; *Mason v. Callender*, 2 Minn. 350 (Gil. 302) 72 Am. Dec. 102.

Where a stipulated sum has been inserted in a contract for a breach of an agreement to sell, the weight of authority seems to hold such sum to be liquidated damages, upon the theory that the damages sustained in almost all cases are uncertain and difficult to estimate. *McCormick v. Mitchell*, 57 Ind. 248; *Gobble v. Linder*, 76 Ill. 157; *Morse v. Rathburn*, 42 Mo. 594, 97 Am. Dec. 359; *Yetter v. Hudson*, 57 Tex. 604; *Berrinkott v. Traphagen*, 39 Wis. 219; *Burk v. Dunn*, 55 Ill. App. 25. Also for a breach of a contract not to engage in any particular profession or business within certain prescribed limits. *Duffy v. Shockey*, supra [11 Ind. 70, 71 Am. Dec. 348]; *Miller v. Elliott*, 1 Ind. 484, 50 Am. Dec. 475; *Martin v. Murphy*, 129 Ind. 464, 28 N. E. 1118; *Johnson v. Gwinn*, supra [100 Ind. 466]; *Esiel v. Hayes*, supra [141 Ind. 41, 40 N. E. 119]; *Beatty v. Coble*, 142 Ind. 329, 41 N. E. 590; *Boyce v. Watson*, 52 Ill. App. 361; *Lange v. Werk*, 2 Ohio St. 519; *Kelso v. Reid*, supra; *Hoagland v. Segur*, 38 N. J. Law, 230. But, where damages can be accurately ascertained, a stipulated sum will, as a rule, be considered as a penalty, regardless of the expressions in or the nature of the contract. *Squires v. Elwood*, 33 Neb. 126, 49 N. W. 939; *Tiernan v. Hinman*, 16 Ill. 400; *St. Louis, etc., Ry. Co. v. Shoemaker*, 27 Kan. 677; *Hahn v. Horstman*, 12 Bush (Ky.) 249.

It is said in *Harris v. Miller* (C. C.) 11 Fed. 118: "(1) Whenever it is at all doubtful whether the sum mentioned was intended as stipulated damages or a penalty to cover actual damages, the law, which always favors the latter as against the former, declares that the sum was intended as a penalty. (2) When the contract is explicit that the sum mentioned shall be considered as liquidated damages, the contract is to be enforced according to its terms, unless qualified by some other circumstances, as when one agrees to pay a larger sum upon the failure to pay a smaller one, or when the damages resulting from a failure to perform the contract are certain, or can be reasonably ascertained by a jury. But whenever the contract is for the doing or not doing a particular act or acts, and there is no certain pecuniary standard by which to measure the damages resulting from a breach thereof, an agreement to pay a stipulated sum as damages for such breach will be enforced literally."

In the consideration of this case we are not unmindful of the established principle that "if a contract contains various stipula-

tions for the breach of some of which the damages would be uncertain, and as to others certain and easily shown by the evidence, then the sum mentioned in an obligation to secure the performance of the contract is regarded as a penalty, and not as liquidated damages." *Carpenter v. Lockhart*, 1 Ind. 435; *East Moline Co. v. Weir Plow Co.*, 95 Fed. 250, 37 C. C. A. 62; *Carter v. Strom*, 41 Minn. 522, 43 N. W. 394; *Smith v. Newell*, 37 Fla. 147, 20 South. 249. In the latter case it is said "that a sum fixed as security for the performance of a contract containing a number of stipulations of widely different importance, breaches of some of which are capable of accurate valuation, for any of which the stipulated sum is an excessive compensation, is a penalty." Therefore, and upon the holdings of the cases last cited, appellant insists that the parties to the contract in suit intended the lump sum mentioned therein as a penalty. We are not persuaded to agree to this conclusion. If we were to consider the language "agree to quit the banking business March 5, 1900, and further agree not to start another bank in the town as long as said John W. Burgett owns the bank of Francesville," as two stipulations, we cannot see how they are widely different in importance, as they both and each of them have reference to the one general object and purpose, that of preventing competition by appellants with appellee in the banking business after March 5, 1900, in the town of Francesville.

The whole subject-matter of the contract was plainly a matter about which they had a right to contract and fix by stipulation the measure of damages for its breach, and, having understandingly done so without fraud, and the contrary does not appear, they should be held to their agreement, if the stipulated sum has reference to uncertain damages. The time for appellants to quit was fixed in the contract. It is presumed they contracted with reference to that time, and not that they should continue the business for a month or a year, or that they might start an opposition bank. To measure by any exact pecuniary standard the amount of damages, if any, appellee might suffer by reason of Merica and Bledsoe continuing the business for a longer time than that mentioned in the contract or in starting an opposition bank, was a matter they no doubt fully considered at the time of entering into the agreement. It seems to us for Bledsoe and Merica, or, as we have said, for either of them, to continue the business, or afterwards engage in such business or start another bank in the same town within the time limited by the contract, there is no exact pecuniary standard by which appellee's damages, if any, could be ascertained. If by reason of their breach of the contract any of the customers of the bank withdrew their deposits, by what pecuniary measure can the damages be fixed for such loss?

The question would at once arise, how much business did the bank lose? how much did they do, or would they have done, had they remained customers of the bank? and whether the business would have been done at a profit or loss to the bank; and many other questions might arise, rendering it impossible from extrinsic evidence to arrive at the exact rights of the parties. The appellee paid \$4,000 for the bank fixtures, books, furniture, etc. Just what proportion of this sum was paid for the tangible property and what proportion was paid for the business thus established by the vendees does not appear, nor does it appear that the sum fixed in the contract, in case of a breach, is unreasonable, and not in proportion to the breach provided against in either stipulation. Nor do the findings show that the amount of damages claimed is unjust or oppressive or that the amount claimed is disproportionate to the damages that might result from a breach of the agreement. Controlled by the facts found, and adhering to the principles of law which obtain in this case, it is our opinion that the stipulated sum in the contract should be construed as liquidated damages. * * *

The judgment is therefore reversed, with instructions to the trial court to restate its conclusions of law so as to conclude there is due appellee from appellants the sum stipulated in the contract, together with interest thereon from the time of the demand, and to render judgment accordingly.

O'KEEFE v. DYER.

(Supreme Court of Montana, 1898. 20 Mont. 477, 52 Pac. 196.)

Action by William O'Keefe against William Dyer and others to recover the sum named in a contract, executed by defendant Dyer as principal, and by the other defendants as sureties, by the terms of which the defendants acknowledged themselves bound to plaintiff for \$1,000, the condition being: "Whereas, the above-bounden Wm. Dyer is about to apply for a United States patent for certain quartz lodes situated in Deer Lodge county; and whereas, in the survey of the Gladstone lode some ground claimed by the said O'Keefe has been included: * * * Now, therefore, if the said William Dyer shall execute to the said Will O'Keefe a deed of quitclaim to the portion of claim above described, at any time when called upon so to do, after the securing of United States patent therefor, then this obligation shall be null and void: otherwise, be and remain in full force and effect."

The complaint alleged that Dyer conveyed the property to the Ontario Mining Company, and that in December, 1894, he secured the patent therefor, which inured to the benefit of the mining

company, and that in May, 1895, the plaintiff demanded a conveyance from Dyer, who refused to make it. The answer admitted the making of the contract, the conveyance to the mining company, and the issuance of the patent, and averred that Dyer's conveyance to the mining company was expressly made subject to all claims existing against him at the time of the transfer with reference to the property, and that the company had always recognized the obligation entered into by Dyer, and ever since receipt of the patent had been ready and willing to execute the conveyance to plaintiff, when demanded, and denied that any demand was ever made for a conveyance, or that Dyer refused to convey. and stated that the plaintiff applied to the company in 1895 for a conveyance, and was informed by its officers that on presentation of the bond, from which the description could be obtained, the company would convey to plaintiff. The answer tendered, and offered to deliver on behalf of the defendants, a deed of bargain and sale from the mining company, conveying to plaintiff the property described in the contract, and the deed was filed with the answer.

The court found that the mining company, since the commencement of the suit, had made and tendered to the plaintiff a deed of the property; that the property is mining ground, and that there was no evidence of its value; that there was no evidence to show that plaintiff had suffered any damages by reason of the technical breach of the bond; and that the sum named in the instrument sued upon was intended at the time it was executed as a penalty, and not as liquidated damages; and that plaintiff had suffered nominal damages only. From these findings of fact the court drew the conclusions of law that plaintiff was entitled to have the deed of the mining company delivered to him; that he should have judgment for one dollar damages and costs; and that the sum named in the obligation was a penalty, and not liquidated damages. From this judgment, plaintiff appeals.

PICOTT, J.³ The second assignment of error is directed to the finding that plaintiff suffered nominal damages only by reason of the breach of the condition of the bond, plaintiff asserting that the pleadings and proof show the breach to have been substantial, and that no title whatever was offered to him. The fourth assignment is that the court erred in finding, as a conclusion of law, that the sum named in the contract is a penalty, and not liquidated damages. These assignments will be considered together.

If, as defendants claim and the trial court found, the sum named in the bond is a penalty, plaintiff can, upon a breach, recover nothing beyond that which will compensate him for his actual

³ Part of the opinion is omitted and the statement of facts is rewritten.

loss. Unless proof be made of the amount of injury suffered, he cannot recover more than nominal damages; and, again, if the sum be penal, doubtless plaintiff might bring an action upon the promise implied from the condition, and, by laying damages beyond that sum, recover, as against the principal, his actual damages, though in excess of the penalty expressed. *Noyes v. Phillips*, 60 N. Y. 408; 13 Am. & Eng. Enc. Law, 867, and cases cited. On the other hand, if the sum be for liquidated damages, as plaintiff claims, no controversy can arise in respect of the quantum of damages, for the reason that the parties have agreed in advance upon a definite sum as that which shall be paid in compensation by the party committing a substantial breach of the condition. *Sedg. Dam.* § 394.

The great principle underlying the law of damages is that of compensation,—exact reimbursement for loss sustained; and hence, while within limits not easily defined in practice, the law will enforce an agreement made between parties to a contract by which they fix in advance a certain amount as the damages which will result from a breach of the contract; yet it requires, as the condition of enforcement, that the intention of the parties to that effect clearly appear by their words, or be manifestly deducible from the circumstances or subject-matter of the contract. Upon this principle, a bond by which the obligor binds himself in a sum of money for the performance of the condition thereof is *prima facie* a penal obligation; and the burden of proving that the sum named was intended as liquidated damages rests upon the party alleging such intention (*Tayloe v. Sandiford*, 7 Wheat. 13, 5 L. Ed. 384); in other words, the sum is not treated as liquidated damages unless the language used in the instrument, or the circumstances existing at the time it was made, show that such was clearly the intention of the parties (*Turck v. Mining Co.*, 8 Colo. 113, 5 Pac. 838).

Resting upon this principle is the further rule, which is a corollary of the doctrine just stated, that, if doubt exist as to the real intention of the parties, it will be resolved by treating the sum as a penalty, "for the leaning of the court in case of doubt will be towards the construction that the provision is a penalty" (*Suth. Dam.* § 286; *Sedg. Dam.* § 408); preferring that construction which will give just and full compensation rather than adopt that which, without reference to the actual damage, is arbitrarily settled before a breach is committed (*Bearden v. Smith*, 11 Rich. Law [S. C.] 554). Another general rule growing out of the principle of compensation is that where the sum mentioned is wholly collateral to the object of the contract, being inserted merely as a security for the performance, it is a penalty, and will not be allowed as liquidated damages (*Sedg. Dam.* § 410); or, to state the rule more fully, where a sum of money is mentioned in a cove-

nant or agreement merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the contract or covenant, and the sum of money but as accessory, and therefore only to secure the damages really incurred (*Barton v. Glover*, Holt, N. P. 43, note).

Applying these principles to the contract before us, we discover nothing in its terms warranting the inference that the parties intended \$1,000 as the exact amount of damages which plaintiff would suffer from a breach of its condition. The language used does not include any expression indicating such intention. The sum mentioned is not designated as stipulated damages, nor is any similar term employed; and, while its absence does not in all cases preclude the court from treating the sum as liquidated damages, still such omission is, ordinarily, significant of the understanding of the parties at the time the contract was made. There is no presumption in the law that damages, resulting from the breach of an obligation to convey a mining claim, cannot be calculated by market value, or estimated by reference to pecuniary standards; nor is there a presumption that it would be impracticable or extremely difficult to fix the actual damage in such case. It is not to be presumed that the value of a mining claim is incapable, impracticable, or extremely difficult of ascertainment. True, evidence of a character different from that adduced to show the value of lands used for purposes other than mining may be required, and its procurement may be attended with difficulty and expense; but, nevertheless, the law does not raise, and the courts do not indulge, the presumption that proof of the value of such a claim is impracticable. In the absence of exceptional circumstances, a promise to pay a certain sum of money if the promisor fail to perform his agreement to convey land is mere security and a penalty (*Dooley v. Watson*, 1 Gray [Mass.] 416); and this rule is applicable to mines as well. * * *

Is there anything extraneous to the contract which would indicate the intention of the parties to agree in advance upon the amount of damages? Counsel for plaintiff, in briefs which exhibit great industry, assume that the evidence established the difficulty of estimating the damages. The only testimony touching the subject upon which the assumption of plaintiff is based is his own testimony, as follows: "It is impossible to tell what the value is. It is a quartz claim, and there is no rule by which you can ascertain its value. * * * I don't know anything about the value of the ground." We discover nothing in this which tends to support the contention that the value of the particular quartz claim owned by plaintiff is impossible or difficult of ascertainment. The plain meaning and obvious effect of his testimony is: "It is impossible to ascertain the value of any quartz mining claim what-

ever. The ground described in the contract is such a claim. Therefore its value cannot be ascertained." He failed to state any fact from which the court could determine whether the opinion or conclusion of the witness was warranted. It was not the duty of the court to believe the bald assertion of the plaintiff to the effect that the value of all quartz mines, and of every one of them, is impossible of ascertainment. The inherent improbability of the statement may well deny to it credence. It did not appear that he had ever visited or inspected the claim, or caused it to be examined, nor was there any evidence of its condition as to development or its character otherwise. Nothing was shown which tended to prove that the value of the mine was difficult or impracticable of estimation.

To illustrate the unsoundness of plaintiff's contention in respect of damages, we may suppose that Dyer had violated the condition of the contract by conveying the mine to a purchaser for value and without notice, thus preventing the enforcement of specific performance; that afterwards the mine was ascertained to be worth many thousands of dollars; that in an action brought by plaintiff against Dyer alone to recover, for failure to perform the promise implied from the condition, damages equal to the value of the property, defendant insisted that the \$1,000 mentioned in the contract was for liquidated damages, while plaintiff contended that the sum stated was a penalty; and that upon the trial defendant testified that it was impossible to ascertain the value which the mine possessed at the time the contract was made, because it was a quartz mining claim. Would the plaintiff under these circumstances be entitled to recover the value of the property, or merely the \$1,000? It would seem that the recovery ought to be measured by the value of the mine, irrespective of the sum mentioned in the contract as security for performance of the condition.

For these reasons, we are of the opinion that the sum mentioned in the contract is a penalty. * * *

There was no actual damage sustained on account of delay, or by reason of the substitution of the name of the grantor; and there is nothing to show that the rights of the plaintiff have been or will be affected by the change in such name. The breach was merely technical. It follows, therefore, that plaintiff was not entitled to recover more than nominal damages, even though the \$1,000 were intended as liquidated damages to be paid for a substantial violation of the condition expressed in the contract. The judgment of the district court is affirmed.

KECK v. BIEBER.

(Supreme Court of Pennsylvania, 1892. 148 Pa. 645, 24 Atl. 170, 33 Am. St. Rep. 846.)

Assumpsit by Emeline C. Keck against Sylvester Bieber on a bond whereby he promised to pay her \$2,000 upon the nonperformance of certain conditions. There was no dispute as to the breach of condition, and a verdict was directed for plaintiff for the full amount of the bond. From a judgment entered thereon, defendant appeals.

MITCHELL, J. The general principle upon which the law awards damages is compensation for the loss suffered. The amount may be fixed by the parties in advance, but, where a lump sum is named by them, the court will always look into the question whether this is really liquidated damages or only a penalty, the presumption being that it is the latter. The name by which it is called is but of slight weight, the controlling elements being the intent of the parties and the special circumstances of the case. The subject has always presented difficulties in the formulation of a general rule, and especially in its application. The books are full of inharmonious decisions. In no state, however, have the difficulties been more successfully minimized than in Pennsylvania, and in no case that I have seen is there a better generalization than that by Agnew, J., in *Streeper v. Williams*, 48 Pa. 450: "In each case we must look at the language of the contract, the intention of the parties as gathered from all its provisions, the subject of the contract and its surroundings, the ease or difficulty of measuring the breach in damages, and the sum stipulated, and from the whole gather the view which good conscience and equity ought to take of the case." The only criticism to which this would seem to be fairly open is that it does not perhaps give sufficient prominence to the intention of the parties as the controlling element, and it should therefore be read in connection with the restatement of it by our late Brother Clark, in *March v. Allabough*, 103 Pa. 335: "The question * * * is to be determined by the intention of the parties, drawn from the words of the whole contract, examined in the light of its subject-matter and its surroundings; and in this examination we must consider the relation which the sum stipulated bears to the extent of the injury which may be caused by the several breaches provided against, the ease or difficulty of measuring a breach in damages, and such other matters as are legally or necessarily inherent in the transaction." The intent of the parties being, therefore, the principal object of ascertainment, Greenleaf lays down certain rules as the result of the cases, and, among them, that the sum is to be taken as a penalty "where the agreement contains several matters of

different degrees of importance, and yet the sum named is payable for the breach of any, even the least." 2 Greenl. Ev. § 258.

This rule is approved in *Shreve v. Brereton*, 51 Pa. 175, and the present case falls exactly within it. The conditions of the appellant's bond are two—First, he is to "save, defend, keep harmless, and indemnify the said Emelina C. Keck" from liability by reason of the assignment to him over the head of Neiser, and the termination of the latter's mining rights. This is clearly a covenant for indemnity only, and, as no breach was assigned, need not be further discussed. But, secondly, he is to pay the royalty accruing in the future, and "keep and perform all the covenants, conditions, and stipulations of the said lease and assignment." Turning now to the lease, we find that plaintiff's covenants with Kemmerer, which appellant thus bound himself to keep and perform, were to save harmless and indemnify him against all costs and damages to his neighbors from the washing of the ore, to run the water in such places as the lessor should order, to pay a stipulated royalty, to fill up holes made and left in the search for ore, to produce or pay royalty upon a minimum of one thousand tons a year, "to use the old wagon road for hauling said iron ore, and, in case there are gates or bars on said road, * * * to keep said gates and bars in repair, * * * and keep them shut when through," etc. The assignment adds to these a covenant to pay plaintiff, the assignor, an additional royalty upon a sliding scale of the price of ore per ton. No better illustration of the propriety of the rule referred to could be stated. Here are numerous covenants of the most varied kinds and importance. The covenants to indemnify against claims by Neiser, and against damages to the neighbors by the operation of washing, are undertakings which may be of serious magnitude; and under *Dick v. Gaskill*, 2 Whart. 184, *Shreve v. Brereton*, 51 Pa. 175, *Moore v. Colt*, 127 Pa. 289, 18 Atl. 8, 14 Am. St. Rep. 845, and similar cases, the recovery for a breach would probably not be limited by the sum named in the bond. On the other hand, the covenants to fill up the holes made in prospecting for ore, and to keep the gates on the old wagon road in repair and shut, are against such trivial inconveniences that it would savor of absurdity to suppose that the parties meant to stipulate for \$2,000 damages for the breach of any one of them.

We are therefore of opinion that defendant's fourth point, that the contract of the parties was for a penalty, should have been affirmed. It will not follow, however, as appellee seems to fear, that her recovery must be limited to the loss of the royalty due her at the time of bringing suit, and that she must bring repeated suits for future failures to pay. The defendant has, by his acts, disabled himself absolutely and permanently from performance of his covenants. Under such circumstances, the plaintiff may sue

on the contract from time to time for the royalties due, and for such other damages as she may suffer, or she may, at her election, treat the contract as rescinded, and claim damages in one action for the entire breach. Judgment reversed, and venire de novo awarded.

II. Alternative Contracts *

SMITH v. BERGENGREN.

(Supreme Judicial Court of Massachusetts, 1891. 153 Mass. 236, 26 N. E. 690, 10 L. R. A. 768.)

Action by J. Ranlett Smith against Frederick W. A. Bergengren for breach of an agreement not to practice medicine in Gloucester. The court ruled that the sum of \$2,000 named in the agreement, was liquidated damages, and defendant excepts.

HOLMES, J. The defendant covenanted never to practice his profession in Gloucester so long as the plaintiff should be in practice there, provided, however, that he should have the right to do so at any time after five years by paying the plaintiff \$2,000, "but not otherwise." This sum of \$2,000 was not liquidated damages; still less was it a penalty. It was not a sum to be paid in case the defendant broke his contract and did what he had agreed not to do. It was a price fixed for what the contract permitted him to do if he paid.

The defendant expressly covenanted not to return to practice in Gloucester unless he paid this price. It would be against common sense to say that he could avoid the effect of thus having named the sum by simply returning to practice without paying, and could escape for a less sum if the jury thought the damage done the plaintiff by his competition was less than \$2,000. The express covenant imported the further agreement that if the defendant did return to practice he would pay the price. No technical words are necessary if the intent is fairly to be gathered from the instrument. *St. Albans v. Ellis*, 16 East, 352; *Stevinson's Case*, 1 Leon. 324; *Bank v. Marshall*, 40 Ch. Div. 112.

If the sum had been fixed, as liquidated damages, the defendant would have been bound to pay it. *Cushing v. Drew*, 97 Mass. 445; *Lynde v. Thompson*, 2 Allen, 456; *Holbrook v. Tobey*, 66 Me. 410, 22 Am. Rep. 581. But this case falls within the language of Lord Mansfield in *Lowe v. Peers*, 4 Burrows, 2225, 2229, that if there is a covenant not to plough, with a penalty, in a lease, a

* For discussion of principles, see Hale on Damages (2d Ed.) § 61.

court of equity will relieve against the penalty; "but if it is worded 'to pay £5 an acre for every acre ploughed up,' there is no alternative; no room for any relief against it; no compensation. It is the substance of the agreement." See, also, *Ropes v. Upton*, 125 Mass. 258, 260.

The ruling excepted to did the defendant no wrong. In the opinion of the majority of the court, the exceptions must be overruled.

INTEREST

I. Pecuniary Losses—Liquidated Demands¹

JUDD v. DIKE.

(Supreme Court of Minnesota, 1883. 30 Minn. 380, 15 N. W. 672.)

BERRY, J.² This is an action for an accounting for property taken and held in trust by defendant for plaintiff; also for a partition of a part of such property and the appointment of a receiver to effect the same. It is, therefore, an equitable action. * * *

The court below finds that in the course of certain transactions relating to property held by defendant in trust for plaintiff, defendant received certain bonds—a one-fourth interest in which defendant “held in trust” for plaintiff; that defendant had sold four of the bonds for cash; and that plaintiff was entitled to her proportionate share of the sums received for them, with interest on the same from the time when such sums were respectively received. The defendant, expressly admitting in his brief that the judgment was entered by a computation of interest according to the finding, insists that the finding was wrong, in that interest should have been computed only from the time when the money received for the bonds was demanded. We do not agree to this. It does not lie in the defendant’s mouth to deny that it was his duty to pay or offer to pay to plaintiff her proportionate share of the money realized from the sale of the bonds as soon as he received it. If he recognized the trust this duty followed as a matter of inference. If he repudiated the trust, and accordingly appropriated the money to his own use, it was a conversion. In either event he should make good the loss ensuing to plaintiff, by paying her interest from the time when she was entitled to the money. Judgment affirmed.

¹ For discussion of principles, see *Hale on Damages* (2d Ed.) § 66.

² Part of the opinion is omitted.

II. Pecuniary Losses—Unliquidated Demands³

LAYCOCK v. PARKER.

(Supreme Court of Wisconsin, 1899. 103 Wis. 161, 79 N. W. 327.)

Action by Henry Laycock against Anna E. Parker to foreclose a mechanic's lien. The contract under which the building was erected provided that the work should be completed by September 15, 1893; that alterations should be made only on written order of the architects, and that the value of the work added or omitted should be computed and the amounts as ascertained added to or deducted from the contract price according to circumstances; that the contract price should be \$18,000. The building was substantially completed January 26, 1894. The last work was done May 31, 1894, up to which time the payments made aggregated \$12,995. At the trial the court allowed the plaintiff for balance due on the contract \$5,005, and for extras, \$1,757; and allowed defendant as counterclaim for omissions \$469, and for damages for delay \$283, resulting in a net finding for plaintiff for \$6,009, for which plaintiff had judgment and an adjudication that he have a lien on the premises. From this judgment defendant appeals.

DODGE, J.⁴ * * * Appellant asserts error in that interest was allowed plaintiff on the balance found his due from the commencement of the suit. The question of interest is one much more often passed upon than carefully considered by courts. It is usually presented only incidentally to much more important issues, and often decided one way or the other at the close of exhaustive investigation of the other questions, and with the perhaps unconscious feeling that it is not of sufficient magnitude to justify further serious labor. Again, the elements involved in determining the question are many of them so elastic in their application that cases may be rightly resolved in different ways without the distinction being apparent from the statement of them. The question is also one of those upon which the old reasons and principles have been departed from in deference to modern business methods and views of commercial equity, and upon which the law has progressed in a steady development away from the early precedents. Sedg. Meas. Dam. § 297.

Anciently interest, called "usury," was an abhorrence to the law, and a contract therefor was not only not enforceable, but criminal. *Adriance v. Brooks*, 13 Tex. 279, 281. The increase of

³ For discussion of principles, see *Hale on Damages* (2d Ed.) §§ 67-70.

⁴ Part of the opinion is omitted and the statement of facts is rewritten.

the importance of personal property and commerce, and the growing recognition of the fact that the use of another's money was valuable to the user, and a legitimate subject for compensation to the owner, at last forced the law to accede thereto, and to yield enforceability to express contracts to pay interest. Lewis' Bl. Comm. bk. 2, p. 454. This concession was followed by a recognition of the fact that a refusal to pay money legally due, like a refusal to perform any other legal duty to another, merited condemnation and punishment from the courts, and the doctrine of interest as damages, in absence of express agreement, became established; but it was allowed as damages and by way of punishment to a wrongdoer. The idea of compensation to him who had been deprived of the use of his money may have been present, but was never prominent, while the thought that the debtor by interest was only paying for value in fact received by him from the use of the money of another is hardly suggested, as in recent cases. *Crescent Min. Co. v. Wasatch Min. Co.*, 151 U. S. 317, 323, 14 Sup. Ct. 348, 38 L. Ed. 177, as compared with *Curtis v. Innerarity*, 6 How. 146, 154, 12 L. Ed. 380. The allowance of interest as damages was, as might have been expected in view of the principle on which it was founded, confined to strictly liquidated demands. Being punishment, it should not be imposed if there were any uncertainty as to defendant's duty to excuse non-performance of it.

As the lending and hiring of money increased more and more with the development of commerce and credits, there developed a growing sense of the equitable character of interest, and step by step that equity in individual cases led to relaxations of the strict rule demanding absolute liquidation of a demand to justify interest allowance by courts; American courts taking the lead in developing this idea. *Bromfield v. Little*, Quincy (Mass.) 108; *Van Rensselaer v. Jewett*, 2 N. Y. 141. Meanwhile legislatures as well as courts were yielding to the sentiment of the community, and, from the original statutes, guardedly permitting express contracts for limited rates of interest, they progressed to that enacted in New York about 1829, which is practically identical with our own existing statute, originally adopted in the revision of 1858, whereby the law itself fixes a rate to be paid in the absence of any agreement therefor, and extends its application not only to money due upon "note or other contract," as in our prior statutes (chapter 45, Rev. St. 1849), but to loan or forbearance of any money, goods, or things in action. Rev. St. 1898, § 1688. Such a change in the statute is certainly significant, and may well justify a difference in states where it is in force as to the class of demands which draw interest without express agreement therefor.

In New York, whence we adopted section 1688 in 1858, *Van Rensselaer v. Jewett*, supra, and *Dana v. Fiedler*, 12 N. Y. 40, 62

Am. Dec. 130, had been decided before that time, and had fully recognized an intermediate class of demands between strictly liquidated ones, like a promissory note for a specified sum, and those wholly unliquidated, like breach of promise to marry, or such torts as slander and libel, and had extended to some of that class of demands which, for convenience, we may term liquidable, the interest-earning right, independently of any agreement. Sedg. Meas. Dam. §§ 299, 300.

In *Van Rensselaer v. Jewett*, supra, which was an action to recover damages for failure to pay as rent each year 18 bushels of wheat, 4 fat hens, and 1 day's service, with carriage and horses, the court (Bronson, J.) said: "It was decided in 1806, without assigning any reason for the judgment, that interest was not recoverable in a case of this kind. *Van Rensselaer v. Platner*, 1 Johns. (N. Y.) 276. But since that time the supreme court has deliberately held, on three several occasions, including the present one, that interest is recoverable in such a case. *Lush v. Druse*, 4 Wend. (N. Y.) 313; *Van Rensselaer v. Jones*, 2 Barb. (N. Y.) 643. The principle to be extracted from these decisions may be stated as follows: Whenever a debtor is in default for not paying money, delivering property, or rendering services in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which has been done him; and a just indemnity, though it may sometimes be more, can never be less than the specified amount of money, or the value of the property or services at the time they should have been paid or rendered, with interest from the time of the default until the obligation is discharged. And, if the creditor is obliged to resort to the courts for redress, he ought in all such cases to recover interest, in addition to the debt, by way of damages. It is true that, on an agreement like the one under consideration, the amount of the debt can only be ascertained by an inquiry concerning the value of the property and services. But the value can be ascertained, and, when that has been done, the creditor, as a question of principle, is just as plainly entitled to interest after the default as he would be if the like sum had been payable in money. The English courts do not allow interest in such cases, and I feel some difficulty in saying that it can be allowed here, without the aid of an act of the legislature to authorize it. But the courts in this and other states have for many years been tending to the conclusion, which we have finally reached, that a man who breaks his contract to pay a debt, whether the payment was to be made in money, or in any thing else, shall indemnify the creditor, so far as that can be done, by adding interest to the amount of damage which was sustained on the day of the breach. The rule is just in itself; and, as it is now nearly nineteen years since the point was decided in favor of the creditor, and eight out of nine

judges of the supreme court have at different times concurred in that opinion, we think the question should be regarded as settled."

The principle of this case has been reaffirmed in New York many times. *McMahon v. Railroad Co.*, 20 N. Y. 463; *McCollum v. Seward*, 62 N. Y. 316, and *Mercer v. Vose*, 67 N. Y. 56, were actions on quantum meruit to recover for services; held, interest recoverable. Other cases in New York are *Newell v. Wheeler*, 36 N. Y. 244; *Adams v. Bank*, 36 N. Y. 255; *Mygatt v. Wilcox*, 45 N. Y. 306, 6 Am. Rep. 90; *Smith v. Velie*, 60 N. Y. 106; *De La-vallette v. Wendt*, 75 N. Y. 579, 31 Am. Rep. 494; *Wilson v. City of Troy*, 135 N. Y. 104, 32 N. E. 44, 18 L. R. A. 449, 31 Am. St. Rep. 817; *Mansfield v. Railroad Co.*, 114 N. Y. 331, 21 N. E. 735, 1037, 4 L. R. A. 566; *Gray v. Railway Co.*, 157 N. Y. 483, 52 N. E. 555. And the rule in that state may be stated to be that interest is allowable upon a demand, the amount of which could be ascertained by computation, together with a reference to reasonably well established market values, because such values in many cases are so nearly certain that it would be possible for the debtor to obtain some approximate knowledge of how much he was to pay; or, to quote from *Mansfield v. Railroad Co.*, supra, it is extended to actions to recover damages for breach of contract, "if the means are accessible to the party sought to be charged of ascertaining the amount, by computation or otherwise, to which the other party is entitled." This general rule has received approval from many other courts as well. *Spalding v. Mason*, 161 U. S. 375, 396, 16 Sup. Ct. 592, 40 L. Ed. 738; *Kuhn v. McKay*, 7 Wyo. 42, 51 Pac. 205. As would be expected, courts have varied greatly in applying these rules to individual cases; but it may be safely said that the tendency has been in favor of allowing interest rather than against it, and that the degree of certainty or ease with which the approximate amount can be ascertained has grown less and less stringent.

In Wisconsin, without perhaps so carefully laying down general rules, the court has in a large measure followed the lines of the New York decisions. * * * *Marsh v. Fraser*, 37 Wis. 152, is perhaps the most quoted case in Wisconsin, and, like the utterances of the Delphic oracle, has been made the basis for antagonistic conclusions. That was a suit on quantum meruit for labor and services in moving a building, with no time of payment fixed, and no evidence of demand. The court held the allowance of interest from the time of the performance of the services error, upon the ground however that no time of payment was fixed, and no demand had been made. * * * In *Yates v. Shepardson*, 39 Wis. 173, which was a suit for professional services, disputed as to rendition, character, and value, it was held that interest ran from the commencement of the suit. There was no evidence of

any earlier demand. The court said, by Lyon, J., who participated in decision of *Marsh v. Fraser*: "By the well-settled rules of law on the subject of interest, which are stated by the chief justice in *Marsh v. Fraser*, 37 Wis. 149, no interest can be allowed on the account before the action was commenced."

In *Tucker v. Grover*, 60 Wis. 245, 19 N. W. 62, a claim for quantum meruit in investigating pine lands (which the court described as "an uncertain one, resting in quantum meruit, being always denied and contested by the defendant, no account thereof rendered nor any demand made for any certain sum, and, of course, not susceptible of computation merely to render it certain, it was clearly unliquidated") interest was held recoverable from the commencement of the suit. *Gammon v. Abrams*, 53 Wis. 323, 10 N. W. 479, was a suit for the reasonable value of a reaper, both the liability and the value being controverted. The court said that interest was properly allowable from the commencement of the suit, and it makes no difference that such value had to be ascertained by evidence. * * * *Farr v. Semple*, 81 Wis. 230, 51 N. W. 319, was an action for the reasonable value of the services of a nurse. The court held interest should be allowed from the rendition of account and demand of payment. * * *

On the other hand, in *Shipman v. State*, 44 Wis. 458, which was a claim for reasonable value of services as an architect, the court held interest not recoverable, saying: "As between individuals, the better rule is that when the right of a party to recover compensation is doubtful, and is contested on reasonable grounds, and the amount due him requires to be adjusted by proceedings in the suit, interest is only recoverable after the right of a party to recover and the amount of the recovery has been determined." *Martin v. State*, 51 Wis. 407, 8 N. W. 248, was a suit for general damages for preventing plaintiff's completion of a contract for the improvement of Fox river, including loss of prospective profits, and the court held interest not recoverable until the amount had been liquidated by an award. In *State v. Warner*, 55 Wis. 271, 9 N. W. 795, and 13 N. W. 255, which was for reasonable value of professional services, the court held interest not recoverable, saying that the amount would have depended on "proofs showing what they were reasonably worth, and upon the evidence it would be a question of fact for the jury. We are unable to distinguish this case from *Marsh v. Fraser*, where it was held that plaintiff could not recover interest."

There is thus a clear conflict in the Wisconsin cases in the application of whatever general rules govern the question, and those general rules have not been set forth, except in a very limited way in *Marsh v. Fraser*, where the question was rather as to whether interest could run before demand than whether it might have run upon the claim there presented, if a proper demand had

been made. Dismissing from consideration *Martin v. State*, where the claim was clearly unliquidable, being for general damages, such as loss of profits, etc., it is obvious that the reasons assigned for refusal of interest in *Shipman v. State* and *State v. Warner* would have equally denied such allowance in *Farr v. Semple*, *Gammon v. Abrams*, *Tucker v. Grover*, and *Yates v. Shepardson*, unless there were elements of uncertainty or distinction not set forth in the two state cases, such, for example, as that there was no market value ascertainable for the services there involved, or because no officer of the state had any lawful power to authoritatively ascertain and settle the amount due.

We think, notwithstanding these two individual cases, that the great weight of authority is in favor of a rule substantially such as that adopted in New York, as above stated. The true principle, which is based on the sense of justice in the business community and on our statute, is that he who retains money which he ought to pay to another should be charged interest upon it. The difficulty is that it cannot well be said one ought to pay money, unless he can ascertain how much he ought to pay with reasonable exactness. Mere difference of opinion as to amount is, however, no more a reason to excuse him from interest than difference of opinion, whether he legally ought to pay at all, which has never been held an excuse. When one is held liable, say, on a promissory note, to which his defense has raised a doubtful question of law, he must pay the interest with it, because theoretically at least, there was a fixed standard of legal obligation, which, if correctly applied, would have made his duty clear. So, if there be a reasonably certain standard of measurement by the correct application of which one can ascertain the amount he owes, he should equally be held responsible for making such application correctly and liable for interest if he does not. The New York courts have adopted as designation of such a standard "market value," and in a broad use of the term this is perhaps the safest test to apply. It must not, however, be restrained to definite quotations on a board of trade, or to such degree of certainty that no difference of opinion could exist. If one having a commodity to purchase or certain services to hire can by inquiry among those familiar with the subject learn approximately the current prices which he would have to pay therefor, a market value can well be said to exist, so that no serious inequity will result from the application of the foregoing rule to those who desire to act justly; especially in view of the other rule of law that a debtor can always stop interest by making and keeping good an unconditional tender, thus giving him a substantial advantage over a creditor, who has no such option.

Applying the rule thus defined to the facts in this case, there is no escape from the conclusion reached by the court below. The bulk of the recovery is for the contract price of \$18,000, less the

payments made, which the court found to be \$439.62 greater than plaintiff admitted in his complaint; such excess apparently being made up of items which belong rather to the class of counterclaims than payments. The balance of the judgment is made up of plaintiff's extras, less the defendant's counterclaims, viz. \$1,004.43. Of this every item was material or labor, which was proved to have a reasonably certain market value at Eau Claire, so that from the statements of witnesses familiar therewith the court was able to fix such value, and the defendant could have done so had he made an honest effort. They involved none of those elements which have been held to make the claim not only wholly unliquidated, but unliquidable—no claim for general damages, nor for loss of profits, as in some of the cases; nor even for professional services, which in some cases (*Swinerton v. Development Co.*, 112 Cal. 375, 44 Pac. 719) have been held to be without a sufficiently certain market value, though in other cases the contrary has been held (*Adams v. Bank*, *supra*; *Mercer v. Vose*, *supra*; *Yates v. Shepardson*, *supra*).

The plaintiff's claims then being such as may draw interest, the next question is, from what date? And about this question some confusion has been thrown by the hasty disposal of interest claims and inconsiderate remarks of courts. The rule of course is that the debtor should pay interest from the time when he ought to have paid the debt. That time may be fixed by agreement, and that agreement may be implied from known customs or other things. It may also be fixed by law, as in *State v. Guenther*, 87 Wis. 676, 58 N. W. 1106, or *Insurance Co. v. Fricke*, 99 Wis. 367, 74 N. W. 372, and 78 N. W. 407, 41 L. R. A. 557, in which event the interest runs from the date so fixed. If not fixed, interest will not commence to run until the creditor makes it the duty of the debtor to pay by an adequate demand that he do so, which demand should be sufficiently specific to inform the debtor of the claim made, so that he can ascertain therefrom the amount he ought to pay, by application of the standard above set forth. When so notified of what his creditor's claim is, and that he is then required to pay it, he is thenceforward wrongfully withholding money from that creditor. *Sedg. Meas. Dam.* §§ 302, 315; *Porley*, *Interest*, § 29; *Marsh v. Fraser*, *supra*; *Farr v. Semple*, *supra*; *Drug Co. v. Hvambshahl*, *supra* [92 Wis. 62, 65 N. W. 873]; *Niblack v. Bank*, 169 Ill. 517, 48 N. E. 438, 39 L. R. A. 159, 61 Am. St. Rep. 203; *White v. Miller*, 78 N. Y. 393, 398, 34 Am. Rep. 544; *Robbins v. Carll*, 93 N. Y. 655.

Another date has crept into the decisions of Wisconsin and many other states as that at which interest on unliquidated (but liquidable) claims and open accounts should commence, to wit, the commencement of the suit. An examination of all of these decisions, with a few unimportant exceptions, will make apparent, however,

that the commencement of suit is only significant because in and of itself it constitutes a demand. On principle, it can have no other force. If a proper and lawful demand for payment cannot put the debtor in default, obviously the commencement of a suit cannot. The one as fully informs defendant of the rights claimed by plaintiff as the other. It would force litigation if a different rule were adopted. If regard for the convenience of the debtor or desire to negotiate would lead the creditor to grant delay, public policy would dictate that he have such opportunity without loss of interest, rather than that litigation be forced upon him to save that right. See Wisconsin decisions hereinbefore mentioned; also, *Hawley v. Tesch*, 88 Wis. 213, 242, 59 N. W. 670; *Sedg. Meas. Dam.* § 315; *Mercer v. Vose*, supra; *Dempsey v. Schawacker*, 140 Mo. 680, 38 S. W. 954, and 41 S. W. 1100; *Quin v. Distilling Co.*, 171 Mass. 283, 50 N. E. 637.

We hold, therefore, that the claim of the plaintiff in this case was capable of ascertainment by defendant, after its presentation, by reference to reasonably certain market values of the various items, that it was duly and adequately presented and its payment demanded before the suit was commenced, and that plaintiff was entitled to interest from the time of such demand, and no error prejudicial to defendant was committed in the allowance made by the judgment. The judgment is modified, * * * and, as, so modified, is affirmed.

FELL v. UNION PACIFIC RY. CO.

(Supreme Court of Utah, 1907. 32 Utah, 101, 88 Pac. 1003.)

Action by A. G. Fell against the Union Pacific Railway Company to recover damages for injury to live stock in transit. By reason of delay the stock was without food or water for several days, as a result of which many animals died and others were so injured and reduced in weight that plaintiff suffered loss. The court entered judgment for the amount found as damages and allowed interest thereon from the date of demand on the railway company for damages. The defendant appeals.

FRICK, J.⁵ * * * The next and only other assignment of error relates to the allowance of interest by the court on the amount of damages found to have been sustained by the respondent. Appellant asserts that, this being an action for unliquidated damages sounding in tort, therefore interest cannot legally be allowed until the loss or damage is ascertained at the trial. It is further contended that such is the law of this state as appears from the decisions of this court.

⁵ Part of the opinion is omitted and the statement of facts is rewritten.

Before referring to our own decisions upon this question, we shall examine the question in the light of the authorities. While it is true that this is an action for a tort, and that the damages were unliquidated, the cause of action, nevertheless, arose out of a contract for carriage; that is, the reciprocal rights and duties arising out of the relation of carrier and shipper arose by virtue of a contract. Both parties insist on this in their pleadings, and such, in the nature of things, must be so. But, since appellant acted in the capacity of a common carrier, its duties and respondent's rights were governed by law, and, as there is no question presented for review in respect to the modification of the law by the contract, we must treat this case, for the purposes of this decision, upon the law applicable to a common carrier of live stock regardless of any special contract. In view of the law, therefore, applicable to common carriers, where, through their negligence, a shipper suffers injury and damages to his property while in transit, or for negligent delay in transportation and delivering the same at the place of destination, what is the prevailing rule as to the amount of damages and the allowance of interest?

In the case of *New York, etc., Ry. Co. v. Estill*, 147 U. S. at page 622, 13 Sup. Ct. at page 456 (37 L. Ed. 292), the United States Supreme Court, in a case for injury to live stock while in transit, states the general rule as to the measure of damages in the following language: "It is well settled as a general rule that the measure of damages in a case of a common carrier is the value of the goods intrusted to it for transportation, with interest from the time when they ought to have been delivered"—citing among other authorities, *Hutchinson on Carriers* (2d Ed.) § 771, and 1 *Sutherland on Damages*, 629. And the court then proceeds further: "But when the matter appears to have been regulated by statute in the state, and the statute has been interpreted by its highest court, the regulation of the statute will be followed in the courts of the United States." This was done in that case, and interest was not allowed only because the Supreme Court of Missouri, under the statute of that state, held that interest is not permitted in case of unliquidated damages, except in special cases. The rule is also stated by the same court, in the case of *Mobile & M. Ry. Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527, where, in the syllabus, it is said: "The measure of damages in an action against a common carrier for loss of goods in transit is their value at the point of destination, with legal interest."

In the case of *Wilson v. Troy*, 32 N. E. 44, 135 N. Y. 96, 18 L. R. A. 449, 31 Am. St. Rep. 817, the Court of Appeals of New York, in discussing the question now under consideration, at page 46 of 32 N. E., page 457 of 18 L. R. A. (135 N. Y. 96, 31 Am. St. Rep. 817), says: "It is difficult to perceive any sound distinction between a case where the defendant converts or carries away the

plaintiff's horse and a case where, through negligence on his part, the horse is injured so as to be valueless. There is no reason apparent for a different rule of damages in the one case than in the other." Quite true that, notwithstanding the court here clearly points out that there can be no distinction in reason, the courts of New York, in deference to early decisions, still cling to the old theory that in certain cases it is for the jury to say whether interest shall be allowed or not. The question, however, is not relegated to the jury in cases like the one at bar, even in New York, as is manifest from the case of *Dana v. Fiedler*, 12 N. Y. 40-50, 62 Am. Dec. 130. * * *

If we assume the case at bar to be one commonly called a case of pure tort for injury to or destruction of personal property through ordinary negligence, still the respondent was entitled to interest according to the great weight of authority. In 22 Cyc. 1500, the following is stated to be the law upon the subject of allowing interest for torts to property: "While it has been laid down in many cases that interest will not be allowed on damages recovered for torts to property unless the defendant has derived some benefit from his tort, or has been guilty of gross negligence, the general rule supported by the great weight of authority is that in cases of torts to property interest on the damages will be allowed as a part of the damages and as an approximately uniform measure of compensation." This text is amply sustained by the following authorities: *Woodland v. U. P. Ry. Co.*, 27 Utah, 543, 26 Pac. 298; *Rhemke v. Clinton*, 2 Utah, 230; *Varco v. Chicago, M. & St. P. Ry. Co.*, 30 Minn. 18, 13 N. W. 921; *Railway Co. v. Joachimi*, 58 Tex. 456; *Fremont, E. & M. V. Ry. Co. v. Marley*, 25 Neb. 138, 40 N. W. 948, 13 Am. St. Rep. 482; *U. P. Ry. Co. v. Ray*, 46 Neb. 750, 65 N. W. 773; *Kendrick v. Towle*, 60 Mich. 363, 27 N. W. 567, 1 Am. St. Rep. 526; *Burdick v. Chicago, M. & St. P. Ry. Co.*, 87 Iowa, 384, 54 N. W. 439; *Johnson v. Chicago & N. W. Ry. Co.*, 77 Iowa, 666, 42 N. W. 512; *Dean v. Chicago & N. W. Ry. Co.*, 43 Wis. 305; *Georgia P. Ry. Co. v. Fullerton*, 79 Ala. 298; *Frazer v. Bigelow C. Co.*, 141 Mass. 126, 4 N. E. 620; *Regan v. New York & N. E. Ry. Co.*, 60 Conn. 124, 22 Atl. 503, 25 Am. St. Rep. 306; *Schmidt v. Nunan*, 63 Cal. 371.

While the foregoing by no means constitute all the authorities that could be cited upon the proposition, they are quite sufficient to show that the rule has become general, and that the allowance of interest in cases of torts to property is in harmony with the trend of modern authority. It is quite true that there are cases against this rule, but they are not, as we conceive, based on either good reason or good logic. The rule adhered to in the *Kansas* and other like cases, as instances where interest is allowed if it appears that the person committing the wrong has to some extent

been benefited from it, is, to our minds, manifestly unjust. In such cases interest is not allowed as compensation at all, but upon the sole ground that the person in the wrong must yield up the benefits derived by him to the one to whom they belong by reason of ownership. It is a matter of simple restoration of what has been withheld without adding anything for the use. It is only a mild way of offering a premium to withhold pay in such cases. Is there any reason why a person sustaining injury and damage to his property from the negligent act of another should not receive just what he has lost as nearly as this may be accomplished in a court of justice? If a person's property is destroyed or damaged, why is he not entitled to be compensated to the full extent of its value in money so that he may replace the same with other property of a like nature? If on the day of its injury or destruction he restores or replaces it with his own money, why is he not entitled to interest on that money to the date of repayment? If he had loaned the money to some one, he certainly would be entitled to interest, and, if he borrowed it from some one, he would likely have to pay interest for its use. By being awarded legal interest, therefore, he is simply placed in statu quo, and nothing short of this is full compensation, and that is just what the law aims to accomplish.

Is it an answer to say that the damages are unliquidated, and therefore interest is not to be allowed? This, to our minds, is no reason at all in case of injury to or destruction of property. In all such cases the party sustaining the loss is limited in his recovery to the market or actual value of the property at the time of the injury or destruction. Moreover, he must establish the amount of the loss by some fixed rule or standard, and the evidence must be confined thereto, and either the court or jury must find the value in accordance with the evidence. In the class of cases, therefore, where the damage is complete, and the amount of the loss is fixed as of a particular time, there is—there can be—no reason why interest should be withheld merely because the damages are unliquidated. There are certain cases of unliquidated damages where interest cannot be allowed. In all personal injury cases, cases of death by wrongful act, libel, slander, false imprisonment, malicious prosecution, assault and battery, and all cases where the damages are incomplete and are peculiarly within the province of the jury to assess at the time of the trial, no interest is permissible. But this is so because the damages are continuing and may even reach beyond the time of trial.

There are also other cases where interest is not allowed, such as where exemplary damages are permitted, where the statute fixes a penalty or determines the damages to be allowed. Of the latter class of cases, *Oregon S. L. R. Co. v. Jones*, 29 Utah, 147, 80 Pac. 732, is, in part, an illustration. Some courts also seem to make a distinction between gross or willful negligence and or-

dinary negligence. In the former, interest is given; in the latter it is withheld. This is arbitrary at best. The loss to the injured person is precisely the same in either case, and he should receive compensation—no more, no less. There is another class of cases where the matter is relegated to the jury or the court trying the case to allow interest or not, as in their judgment may seem proper, as a part of the damages to be allowed. This rule does not seem to be based upon any sound reason. Moreover, it must lead to uncertainty, and may tend to favoritism in its application. In one case the jury may allow 20 per cent., in another only 2, and in another none at all, although the cases may be essentially the same. If the law is to be treated as a science, it should be as nearly exact as it can be made, and its operation should be uniform. In those cases the courts hold that, if the amount allowed by the jury in the form of interest makes the damages excessive, then the courts will require a remittitur of the excess or grant a new trial.

The whole matter, then, resolves itself into a question of excessive damages. If the amount allowed by the jury is excessive—that is, not supported by the evidence when considered as a whole—in cases where the amount of damage is to be ascertained as of a particular time and in accordance with fixed rules of evidence and known standards of value, or if the damages allowed are excessive, appearing to have been given under the influence of passion or prejudice, the trial courts should, when a motion for a new trial is made upon that ground, require a remittitur of the excess, or grant a new trial. The power and discretion to do this is expressly vested in the trial courts of this state, and should be exercised whenever it is manifest that justice and right require it, and, unless this appears, the courts should not interfere with the verdict of the jury. When excessive damages are allowed, the case should be treated and corrected as such, and not by this court or any court assuming the power to arbitrarily withhold interest in all cases of unliquidated damages. General justice is never promoted by an effort to reach it by ignoring sound principles of law in particular cases. Whenever possible, it ought not be left to the mere caprice of either court or jury to either grant or withhold that which is due. A fixed rule, when based on sound principles, is, in most instances, a safer guide than the judgment of a few individuals, however honest or pure their motives. * * *

The true test to be applied as to whether interest should be allowed before judgment in a given case or not is, therefore, not whether the damages are unliquidated or otherwise, but whether the injury and consequent damages are complete and must be ascertained as of a particular time and in accordance with fixed rules of evidence and known standards of value, which the court or jury must follow in fixing the amount, rather than be guided by their best judgment in assessing the amount to be allowed for past as

well as for future injury, or for elements that cannot be measured by any fixed standards of value. The same rule under the same conditions would of necessity apply to actions for breach of contract. * * *

As the case at bar falls clearly within the rule where the amount is computed as of a fixed time, and in accordance with fixed rules of evidence as to value, the court did not err in computing, on the amount of damages found, interest at the legal rate. The judgment therefore is affirmed, with costs.⁶

⁶ See, also, *Jacksonville, T. & K. W. Ry. Co., v. Peninsular Land Transp. & Mfg. Co.*, post, p. 167.

VALUE

I. How Estimated¹

CALUMET RIVER RY. CO. v. MOORE.

(Supreme Court of Illinois, 1888. 124 Ill. 329, 15 N. E. 764.)

SHOPE, J.² The three cases of Calumet River Railway Co. v. Clara Moore et al.; Same v. John Leffler et al.; and Same v. Jennette Freeman et al., involving the condemnation of the right of way of appellant company's railway across adjoining tracts of land, and presenting substantially the same questions, will be considered together. An objection common to each case is that the damages awarded were excessive, and the judgments severally rendered should be reversed. * * *

"It was conceded," counsel for appellant says in his brief, "by all the witnesses, that this river property had a value as possible dock property," and the evidence clearly tended to show that fact. But it is said that the evidence does not show that there is now any demand for docks at this point on the river, and that the consideration of such possible demand introduced speculative elements, and that the estimates in respect thereof were speculative and remote, and therefore improper. In proceedings for condemnation of private property for public use, as is here sought to be done, the damages to be awarded as compensation to the land-owner must be based upon the fair cash value of the land at the time of the condemnation thereof. The questions ordinarily to be determined by the jury are, (1) what is the present market value of the land taken? and (2) to what extent, if at all, will the remainder of the tract of land not taken be depreciated in its market value by reason of the taking and appropriation of the land taken to the proposed use? The compensation is to be estimated with reference to the uses for which the property is suitable in its then condition, having regard to its location, situation, and quality, and to the business wants in that locality, or such as might reasonably be expected in the near future. If these lots were available for dock purposes, for which, as shown, there was no immediate demand, their value when improved by the building of docks, the profits that might be derived therefrom, or the value of the lots at some future time, as when business or the wants of the community

¹ For discussion of principles, see Hale on Damages (2d Ed.) § 76.

² Part of the opinion is omitted.

might make profitable the making of docks or slips on this property, would be merely conjectural and remote, forming no proper element in estimating the damages to be paid. But if the fact that these lots were located with a frontage on this river at a place where they could at some future time, when demanded, be made available as dock property, enhanced their present market value in their then condition and state of improvement, or want of improvement, that fact would be competent and proper to be shown, and be considered by the jury in estimating the damages. It can make no difference that there might be no present demand for docks upon these lands. If, in consequence of their supposed adaptation to such use, they had an increased market value above what they otherwise would have, such value forms the proper basis of recovery.

We said in *Railroad Co. v. Jacobs*, 110 Ill. 414, that in these cases "the real issue was what was the market value of the property for any purpose for which it is adapted or might be used." And so, in *Dupuis v. Railway Co.*, 115 Ill. 97, 3 N. E. 720, we held that if lands were valuable by reason of their location on or near a river, for the purposes of operating a saw-mill or factory, or any other purpose, testimony to prove the same was proper for the consideration of the jury, in determining the fair market value of the premises. *Railway Co. v. Walsh*, 106 Ill. 253; *Washburn v. Railroad Co.*, 59 Wis. 364, 18 N. W. 328. The evidence in this case shows that these lots, 3 and 4, had a market value based upon their availability to be put to the purpose indicated, and, so far as the evidence tended to show the present market value of the lots, we are of opinion it was competent, and that damages based thereon are neither remote nor speculative. It is evident that the jury estimated the damages from the present cash market value of the land as they found it to be from the evidence, as they were instructed by the court to do. The jury were expressly told that, in determining the value of the lots for dock purposes, the value should be estimated at its present cash market value. The jury had before them evidence tending to show the capabilities and adaptability of these parcels of land to dock purposes by reason of their location and their abutting on this river, and that the market value thereof, as then situated, was enhanced by this fact. It clearly appears that their availability for dock purposes is wholly destroyed by the taking and appropriation of the right of way across the lots by petitioner's road. The injury is permanent; and, viewing the case and all its facts, we cannot say that the damages awarded were grossly excessive or unreasonable.

It is argued that the jury must have considered improper elements in the cases of *Leffler* and *Freeman*, from the fact that there is great disparity between the damages awarded them and the damages awarded appellees *Moore* and others; but it will be only

necessary to say that lot 2, owned by the latter, is not shown to be adapted to dock purposes, to account for the difference in the damages awarded, if there were no other reason therefor. * * *

Judgment affirmed.

II. Market Value³

JACKSONVILLE, T. & K. W. RY. CO. v. PENINSULAR LAND, TRANSP. & MFG. CO.

(Supreme Court of Florida, 1891. 27 Fla. 1, 9 South. 661, 17 L. R. A. 33, 65.)

Action for damages for the destruction of property in Tavares, Fla., to wit, a hotel, two stores, a livery stable, several cottages, and some personal property, by a fire caused by the escape of sparks from defendant's locomotive. There was judgment for the plaintiff for \$52,909, and the defendant railway company appeals.

RANEY, C. J.⁴ * * * The law as to what is the "measure of damage" in the abstract, in cases where the property of one has been destroyed, unintentionally, but by the negligence or carelessness of another, where there is no element of willfulness or maliciousness in the destruction, is well settled to be "just compensation in money for the property destroyed;" such an amount as will fully restore the loser to the same property status that he occupied before the destruction. To arrive at the amount of such compensation, inquiry, in the absence of malice, is necessarily confined strictly to the ascertainment of the value of the properties destroyed, with such incidents of interest for the retention of such value from the person entitled thereto as may be sanctioned by law. The contention of the appellant * * * is that the plaintiff, in establishing the value of his destroyed properties, should have been confined to proof of its market value at the time and place of its destruction; and that the admission of evidence as to the original cost of the properties, and as to the depreciation thereof from its original cost by usage or otherwise, was erroneous; and that it was error to instruct the jury that the plaintiff was entitled, as matter of law, to interest, at the rate fixed by law, upon whatsoever amount of damages they might find the plaintiff to be entitled to.

Wherever there is a well-known or fixed market price for any property, the value of which is in controversy, it is proper, in establishing the value, to prove such market value; but, in order to

³ For discussion of principles, see Hale on Damages (2d Ed.) §§ 77, 78.

⁴ Part of the opinion is omitted and the statement of facts is rewritten.

say of a thing that it has a market value, it is necessary that there shall be a market for such commodity; that is, a demand therefor—an ability, from such demand, to sell the same when a sale thereof is desired. Where, therefore, there is no demand for a thing—no ability to sell the same—then it cannot be said to have a market value “at a time when, and at a place where,” there is no market for the same. We think it would have been a very harsh rule in a case like this to have confined the plaintiff to proof of the market value of the property at the time and place of its destruction, in the absence of proof that at the time and place of such destruction there was a market for such property. In cases where property is of a well-known kind in general use, having a recognized standard value, it is not proper to circumscribe the proof of such value within the limits of the market demand at the time when, and at the place where, it was destroyed.

Were the rule contended for to prevail, then the compensation for personal properties, confessedly worth thousands of dollars, would be reduced to a pittance in cents if destroyed en route from market to market, in a thinly-settled, barren country where there was no demand, simply because of the accident of “time and place” of its destruction. In actions of this kind, where the value of the properties destroyed is the criterion of the amount of damage to be awarded, and the property destroyed has no market value at the place of its destruction, then all such pertinent facts and circumstances are admissible in evidence that tend to establish its real and ordinary value at the time of its destruction; such facts as will furnish the jury, who alone determine the amount, with such pertinent data as will enable them reasonably and intelligently to arrive at a fair valuation; and to this end the original market cost of the property; the manner in which it has been used; its general condition and quality; the percentage of its depreciation since its purchase or erection, from use, damage, age, decay, or otherwise—are all elements of proof proper to be submitted to the jury to aid them in ascertaining its value. And to establish value in such cases the opinions of witnesses acquainted with the standard value of such properties are properly admissible. * * *

The amount which it would have cost to erect buildings of the same kind on the day of the fire, less a proper deduction for deterioration, is not the proper measure of damages in a case of this kind. * * *

The value of the property at the time and place of the fire is the question the jury is to pass upon. This the court charged, and the plaintiff admitted. Market value is what a thing will sell for. Railroad, etc., Co. v. Bunnell, 81 Pa. 414. To make a market, however, there must be buying and selling. Blydenburgh v. Welsh, 1 Baldw. 340. Property may have a value for which the owner may recover if it be destroyed, although it have no market value. Rail-

road Co. v. Stanford, 12 Kan. 354, 380, 15 Am. Rep. 362. "Suppose," asks the court in the case just cited, "a rod of railway track, or a shade tree, or a fresco painting on the walls or ceiling of a house, or a bushel of corn on the western plains, should be destroyed, could there be no recovery for these articles simply because there might be no actual market value for the same?" To fix the market value of a thing, it seems to us that there must be a selling of things of the same kind. If there had ever been a sale of an hotel, or of any other building, in Tavares, we are not informed; and we have no judicial knowledge, nor does the record inform us, that hotels have a market value there. Yet, though there is no market value or standard value, the plaintiff should not be allowed more than the property destroyed by fire on the 9th of April, 1888, was reasonably worth in Tavares. To do this it is proper to invoke the aid of all facts calculated to show its value, and we are unable to perceive that the circuit judge erred in admitting the evidence of the cost of replacing the building on the day of the fire. It was a fact tending to show, and to be considered with others, by the jury in determining what amount of money would put the plaintiff in the position in which he was at the time. * * * If an article has no market value, its value may be shown by proof of such elements or facts affecting the question as exist. Recourse may be had to the items of cost, and its utility and use. 2 Suth. Dam. 378.

In Luse v. Jones, 39 N. J. Law, 707, the plaintiff was permitted to show the cost of a bedstead as tending to prove its value. This cost was the price at which a regular dealer in such articles had sold it when new in the ordinary course of trade. "A sale so made," said the court, "was evidence of the market value of the thing when new, and the value of such goods when worn can scarcely be ascertained except by reference to the former price, and the extent of the depreciation. Of course, the cost alone would not be a just criterion of the present value, but it would constitute one element in such a criterion, and the attention of the jury in this case was clearly directed to the importance which it deserved to have." See, also, Sullivan v. Lear, 23 Fla. 463, 474, 2 South. 846, 11 Am. St. Rep. 388. In Whipple v. Walpole, 10 N. H. 130, it was held it was admissible to prove what horses like those lost or injured cost at a town near the place where the loss occurred. Upon the same principle, and for even stronger reasons, we think that the cost of restitution at the time of the destruction of the building was an element which might be considered by the jury with others in ascertaining value. * * *

The question of value in cases where, as here, there is no market value, is one peculiarly for the jury. * * *

Upon the question of the allowance of interest as matter of right upon the amount of damages found by the jury, from the date of

the destruction of the property in cases like this, where the damages sued for are unliquidated, the following authorities, with others that we have examined, hold, in effect, "that the jury may, at their discretion, allow and include interest in their verdict as damages, but not as interest eo nomine:" 2 Sedg. Dam. p. 190; authorities cited in note to *Selleck v. French*, 6 Am. Dec. 196; *Black v. Transportation Co.* 45 Barb. (N. Y.) 40; *Railroad Co. v. Sears*, 66 Ga. 499; *Lincoln v. Claflin*, 7 Wall. 132, 19 L. Ed. 106; *Garrett v. Railway Co.*, 36 Iowa, 121; *Brady v. Wilcoxson*, 44 Cal. 239. In all these authorities no other reason is given for this rule than that it has been so held in other cases that have gone before them, except that in a few cases it is put upon the ground that where property is wrongfully taken and withheld, the defendant gets the benefit of its use during the detention, and is required to pay interest as compensation for such use, when in cases of property wrongfully destroyed the defendant derives no benefit therefrom. The answer to this theory is that, in cases of this kind for the negligent and wrongful destruction of property, the issue as to the amount of the compensation does not depend upon benefits that accrued therefrom to the defendant, whose negligent act brought about the destruction; but the issue rests wholly upon the question as to what is the sum of the damage to the party whose property has been destroyed. Neither do we think this theory can properly be applied even in cases of trespass and trover. Interest on the value of the property taken in those cases cannot correctly be said to be allowed to the plaintiff "because the defendant derives benefit from the use of the property," but is allowed to the plaintiff to compensate him for his deprivation of its use during the detention thereof. * * *

At what time does the liability for the negligent destruction of property attach to the wrong-doer if it shall be found that all things concur to set such liability in motion? It has been sometimes contended that such liability attaches only upon the finding of the jury. We do not think so. The verdict of the jury simply declares the liability and fixes the amount. The law attaches the liability at the time of the destruction, if all the circumstances attendant thereon concur in stamping the case with the legal elements of liability. As before seen, the measure of the loser's damage is the value of his property destroyed at the time of its destruction. Why at the time of destruction? Because it is at that time that the destroyer becomes liable for such value. The loser, before and at the time of such destruction, was entitled to his property, and the beneficial use of it; and instantly, upon such destruction, becomes, under the law, entitled to its value in money at the hands of the wrong-doer, and can sue instantly for such value. Because, through the law's delays, no opportunity is afforded to have the amount of that value declared by a jury for

a year, perhaps several years, is it right that the loser shall, during all that time, be kept out of both his property, its use, and its value, without some remuneration for the retention by the wrong-doer of such value? Upon every principle of right we cannot think so. The theory of the measure of liability in such cases is just compensation. We cannot see either justice or completeness of the compensation dispensed under a rule that declares a party who wrongfully destroys another's property to be liable at the time of such destruction for the value thereof, but that permits the wrong-doer to withhold such value for years, without some compensation for such retention. * * * The judgment is affirmed.

III. Value Peculiar to Owner ⁵

BARKER v. S. A. LEWIS STORAGE & TRANSFER CO.

(Supreme Court of Errors of Connecticut, 1905. 78 Conn. 198, 61 Atl. 363.)

Action for conversion of household furniture and personal effects by David O. Barker and wife against the S. A. Lewis Storage & Transfer Company. From a judgment for plaintiffs, defendant appeals.

PRENTICE, J.⁶ The plaintiffs delivered to the defendant, as a warehouseman, for storage, certain household furniture and personal effects. This action was brought to recover damages for their conversion. * * * The property in question included, as was claimed, certain family records, pictures, photographs, heirlooms, and other articles of peculiar value to the plaintiffs. With respect to these articles the court gave instructions in the language of *Green v. Boston & L. R. Co.*, 128 Mass. 222, 35 Am. Rep. 370, of which no complaint is made. The remaining property was household furniture and effects, including books, all claimed to have been purchased by or presented to the plaintiffs when new, for use by them in housekeeping, and in fact so used by them in their home in New Haven until the time that they were stored with the defendant upon the occasion of their having temporarily broken up housekeeping to go into the country. The defendant claimed that the measure of the plaintiffs' recovery for these articles was their fair market value at the time and place of conversion, with lawful interest since that date. It asked the court to so charge, and sought by the introduction of evidence to show

⁵ For discussion of principles, see *Hale on Damages* (2d Ed.) § 79.

⁶ Part of the opinion is omitted.

that there was a secondhand market for such things in New Haven, and presumably, although no definite offer was made, to follow up that line of inquiry by offering evidence of some sort claimed to show the value of articles of the kind in question in such market. The court was correct in refusing to instruct the jury as requested, and in excluding said testimony.

The cardinal rule is that a person injured shall receive fair compensation for his loss or injury, and no more. *Baldwin v. Porter*, 12 Conn. 473. Commonly in cases of conversion the loss is the value of the property. *Baldwin v. Porter*, supra. Commonly the value of the property, as representing the owner's loss, is its market value, if it have one, since thereby is indicated the cost of replacing. Hence the subordinate rule of general application appealed to by the defendant. But the principal rule, which seeks to give fair compensation for the loss, is the paramount one; and ordinarily, when the subordinate one fails to accomplish the desired result, it yields to an exception or modification. *Sutherland on Damages*, § 12. It is now generally recognized that wearing apparel in use, and household goods and effects owned and kept for personal use, are articles which cannot in any fair sense be said to be marketable and have a market value, or at least a market value which is fairly indicative of their real value to their owner, and of his loss by being deprived of them. So it has been frequently, and we think correctly, held that the amount of his recovery in the event of conversion ought not to be restricted to the price which could be realized by a sale in the market, but he should be allowed to recover the value to him based on his actual money loss, all the circumstances and conditions considered, resulting from his being deprived of the property; not including, however, any sentimental or fanciful value he may for any reason place upon it. *Denver, etc., R. Co. v. Frame*, 6 Colo. 385; *McMahon v. City of Dubuque*, 107 Iowa, 62, 77 N. W. 517, 70 Am. St. Rep. 143; *Int. Ry. Co. v. Nicholson*, 61 Tex. 553; *Fairfax v. New York C. & H. R. Co.*, 73 N. Y. 167, 29 Am. Rep. 119; *Sell v. Ward*, 81 Ill. App. 675; *Joyce on Damages*, § 1037; *Sutherland on Damages*, § 1117; *Sedgwick on Damages*, § 251.

The court in one portion of its charge stated this rule to the jury in substance, in so far, at least, as was required by any claim on the part of the plaintiffs. In another place, however, it was less careful in its language, and, while doubtless intending to express the same principle elsewhere stated, it used the following language: "The measure of damages in this case, gentlemen, relates to the actual value of the property at the time of its conversion; and that is to be determined from the cost of the property, the extent to which it has been used, and its condition at the time of the conversion." This was an altogether misleading statement. It selected three of the many factors which might enter

into the consideration of the question of fair compensation, made them the sole and decisive ones, and ignored all others. Under such instructions a jury might well go far astray, and we are unable to say, from a study of the charge as a whole, that the error here committed was elsewhere corrected so that the jury approached the inquiry as to the amount of damages to be awarded with a correct understanding of the law. * * * There is error, and a new trial is granted. All concur.

LOUISVILLE & N. R. CO. v. STEWART.

(Supreme Court of Mississippi, 1901. 78 Miss. 600, 29 South. 394.)

Action by Mrs. T. C. Stewart against the Louisville & Nashville Railroad Company to recover for damages to certain household furniture and some oil portraits of the parents of Mrs. Stewart's husband. From a verdict and judgment for the plaintiff in the court below for \$600, and the overruling of defendant's motion for a new trial, it appeals.

WHITFIELD, C. J. The court excluded the hearsay testimony of Mrs. Stewart as to the value of the oil portraits, and there was no evidence before the jury as to cost. Nor was there any as to what it would cost to replace or restore them, nor any of any kind, except that she was allowed to answer as to what they were worth to her, from the associations connected with them—they being family portraits; their purely sentimental value, in other words. This is not competent. The true rule in such cases is, not to inquire as to market value, since such articles have no market value, but to show the "actual value to him who owns the portraits, taking into account the cost, the practicability and expense of replacing it, and such other considerations as in the particular case affect its value to the owner." *Green v. Railroad Co.*, 128 Mass. 221, 35 Am. Rep. 370; *Railway Co. v. Nicholson*, 61 Tex. 550; *Hutch. Carr.* § 770 (b).

It was error not to have sustained the objection made to this testimony. But the evidence would abundantly sustain a verdict for \$538 damages to the other articles; and, if appellant will remit down to that sum, the judgment will be affirmed, since, on the facts of this record, there is no merit in any other contention. So ordered.

IV. Highest Intermediate Value ⁷

WRIGHT v. BANK OF THE METROPOLIS.

(Court of Appeals of New York, 1888. 110 N. Y. 237, 18 N. E. 79, 1 L. R. A. 289, 6 Am. St. Rep. 356.)

Stock which had been deposited with the Bank of the Metropolis as collateral was wrongfully sold by defendant on January 28, 1878, for \$2,261.50. The sale was not known to the owner, B. H. Wright, until May 9th. This action for the conversion of the stock was begun October 7, 1879. On February 14, 1881, the stock reached its highest price between the date of conversion and the day of trial, selling for \$19,003. The jury returned a verdict for plaintiff for \$3,391.25. There was no evidence showing when the stock reached that value. The verdict was set aside on plaintiff's motion. The order was reversed by the General Term and judgment ordered on the verdict. From the judgment entered in compliance with the order of the General Term, both parties appeal.

PECKHAM, J.⁸ * * * By the charge the case was left to the jury to give the highest price the stock could have been sold for, intermediate its conversion and the day of trial, provided the jury thought, under all the circumstances, that the action had been commenced within a reasonable time after the conversion, and had been prosecuted with reasonable diligence since. Authority for this rule is claimed under *Romaine v. Van Allen*, 26 N. Y. 309, and several other cases of a somewhat similar nature, referred to therein. *Markham v. Jaudon*, 41 N. Y. 235, followed the rule laid down in *Romaine v. Van Allen*. In these two cases a recovery was permitted which gave the plaintiff the highest price of the stock between the conversion and the trial. In the *Markham Case* the plaintiff had not paid for the stocks, but was having them carried for him by his broker (the defendant) on a margin. Yet this fact was not regarded as making any difference in the rule of damages, and the case was thought to be controlled by that of *Romaine*. In this state of the rule the case of *Matthews v. Coe*, 49 N. Y. 57-62, came before the court. The precise question was not therein involved; but the court, per Church, C. J., took occasion to intimate that it was not entirely satisfied with the correctness of the rule in any case not special and exceptional in its circumstances; and the learned judge added that they did not regard the rule as so firmly settled by authority as to be beyond

⁷ For discussion of principles, see *Hale on Damages* (2d Ed.) §§ 83, 84.

⁸ Part of the opinion is omitted and the statement of facts is rewritten.

the reach of review whenever an occasion should render it necessary.

One phase of the question again came before this court, and in proper form, in *Baker v. Drake*, 53 N. Y. 211, 13 Am. Rep. 507, where the plaintiff had paid but a small percentage on the value of the stock, and his broker, the defendant, was carrying the same on a margin, and the plaintiff had recovered in the court below, as damages for the unauthorized sale of the stock, the highest price between the time of conversion and the time of trial. The rule was applied to substantially the same facts as in *Markham v. Jaudon*, *supra*, and that case was cited as authority for the decision of the court below. This court, however, reversed the judgment, and disapproved the rule of damages which had been applied. The opinion was written by that very able and learned judge, Rapallo, and all the cases pertaining to the subject were reviewed by him, and in such a masterly manner as to leave nothing further for us to do in that direction. We think the reasoning of the opinion calls for a reversal of this judgment. * * *

In stating what in his view would be a proper indemnity to the injured party in such a case, the learned judge commenced his statement with the fact that the plaintiff did not hold the stocks for investment; and he added that, if "they had been paid for and owned by the plaintiff, different considerations would arise, but it must be borne in mind that we are treating of a speculation carried on with the capital of the broker, and not of the customer. If the broker has violated his contract or disposed of the stock without authority, the customer is entitled to recover such damages as would naturally be sustained in restoring himself to the position of which he has been deprived. He certainly has no right to be placed in a better position than he would be in if the wrong had not been done. The whole reasoning of the opinion is still based upon the question as to what damages would naturally be sustained by the plaintiff in restoring himself to the position he had been in; or, in other words, in repurchasing the stock. It is assumed in the opinion that the sale by the defendant was illegal and a conversion, and that plaintiff had a right to disaffirm the sale, and to require defendants to replace the stock. If they failed, then the learned judge says the plaintiff's remedy was to do it himself, and to charge the defendants with the loss necessarily sustained by him in doing so.

Is not this equally the duty of a plaintiff who owns the whole of the stock that has been wrongfully sold? I mean, of course, to exclude all question of punitive damages resting on bad faith. In the one case the plaintiff has a valid contract with the broker to hold the stock, and the broker violates it and sells the stock. The duty of the broker is to replace it at once, upon the demand of the plaintiff. In case he does not, it is the duty of the plaintiff

to repurchase it. Why should not the same duty rest upon a plaintiff who has paid in full for his stock, and has deposited it with another conditionally? The broker who purchased it on a margin for the plaintiff violates his contract and his duty when he wrongfully sells the stock, just as much as if the whole purchase price had been paid by the plaintiff. His duty is in each case to replace the stock upon demand, and, in case he fail so to do, then the duty of the plaintiff springs up, and he should repurchase the stock himself. This duty it seems to me is founded upon the general duty which one owes to another who converts his property under an honest mistake, to render the resulting damage as light as it may be reasonably within his power to do. * * *

The rule of damages as laid down in *Baker v. Drake*, in cases where the stock was purchased by the broker on a margin for plaintiff, and where the matter was evidently a speculation, has been affirmed in the later cases in this court. See *Gruman v. Smith*, 81 N. Y. 25; *Colt v. Owens*, 90 N. Y. 368. In both cases the duty of the plaintiff to repurchase the stock within a reasonable time is stated. I think the duty exists in the same degree where the plaintiff had paid in full for the stock, and was the absolute owner thereof. In *Baker v. Drake* the learned judge did not assume to declare that in a case where the pledgor was the absolute owner of the stock, and it was wrongfully sold, the measure of damages must be as laid down in the *Romaine Case*. He was endeavoring to distinguish the cases, and to show that there was a difference between the case of one who is engaged in a speculation with what is substantially the money of another and the case of an absolute owner of stock which is sold wrongfully by the pledgee. And he said that at least the former ought not to be allowed such a rule of damages. It can be seen, however, that the judge was not satisfied with the rule in the *Romaine Case*, even as applied to the facts therein stated. In his opinion he makes use of this language: "In a case where the loss of probable profits is claimed as an element of damage, if it be even allowable to mulct a defendant for such a conjectural loss, its amount is a question of fact, and a finding in regard to it should be based upon some evidence." In order to refuse to the plaintiff in that case, however, the damages claimed, it was necessary to overrule the *Markham Case*, which was done.

Now, so far as the duty to repurchase the stock is concerned, I see no difference in the two cases. There is no material distinction in the fact of such ownership which should place the plaintiff outside of any liability to repurchase after notice of sale, and should render the defendant continuously liable for any higher price to which the stock might mount after conversion and before trial. As the same liability on the part of defendant exists in each case to replace the stock, and as he is technically a wrong-doer in

both cases, but in one no more than in the other, he should respond in the same measure of damages in both cases; and that measure is the amount which, in the language of Rapallo, J., is the natural, reasonable, and proximate result of the wrongful act complained of, and which a proper degree of prudence on the part of the plaintiff would not have averted. The loss of a sale of the stock at the highest price down to trial would seem to be a less natural and proximate result of the wrongful act of the defendant in selling it when plaintiff had the stock for an investment, than when he had it for a speculation; for the intent to keep it as an investment is at war with any intent to sell it at any price, even the highest. But in both cases the qualification attaches that the loss shall only be such as a proper degree of prudence on the part of the complainant would not have averted, and a proper degree of prudence on the part of the complainant consists in repurchasing the stock after notice of its sale, and within a reasonable time. If the stock then sells for less than the defendant sold it for, of course the complainant has not been injured, for the difference in the two prices inures to his benefit. If it sells for more, that difference the defendant should pay.

It is said that as he had already paid for the stock once, it is unreasonable to ask the owner to go in the market and repurchase it. I do not see the force of this distinction. In the case of the stock held on margin, the plaintiff has paid his margin once to the broker, and so it may be said that it is unreasonable to ask him to pay it over again in the purchase of the stock. Neither statement, it seems to me, furnishes any reason for holding a defendant liable to the rule of damages stated in this record. The defendant's liability rests upon the ground that he has converted, though in good faith, and under a mistake as to his rights, the property of the plaintiff. The defendant is, therefore, liable to respond in damages for the value. But the duty of the plaintiff to make the damage as light as he reasonably may rests upon him in both cases; for there is no more legal wrong done by the defendant in selling the stock which the plaintiff has fully paid for than there is in selling the stock which he has agreed to hold on a margin, and which agreement he violates by selling it. All that can be said is that there is a difference in amount, as in one case the plaintiff's margin has gone, while in the other the whole price of the stock has been sacrificed. But there is no such difference in the legal nature of the two transactions as should leave the duty resting upon the plaintiff in the one case to repurchase the stock, and in the other case should wholly absolve him therefrom.

A rule which requires a repurchase of the stock in a reasonable time does away with all questions as to the highest price before the commencement of the suit, or whether it was commenced in a

reasonable time, or prosecuted with reasonable diligence; and leaves out of view any question as to the presumption that plaintiff would have kept his stock down to the time when it sold at the highest mark before the day of trial, and would then have sold it, even though he had owned it for an investment. Such a presumption is not only of quite a shadowy and vague nature, but is also, as it would seem, entirely inconsistent with the fact that he was holding the stock as an investment. If kept for an investment, it would have been kept down to the day of trial; and the price at that time there might be some degree of propriety in awarding, under certain circumstances, if it were higher than when it was converted. But to presume in favor of an investor that he would have held his stock during all of a period of possible depression, and would have realized upon it when it reached the highest figure, is to indulge in a presumption which, it is safe to say, would not be based on fact once in a hundred times. To formulate a legal liability based upon such presumption I think is wholly unjust in such a case as the present. Justice and fair dealing are both more apt to be promoted by adhering to the rule which imposes the duty upon the plaintiff to make his loss as light as possible, notwithstanding the unauthorized act of the defendant, assuming, of course, in all cases, that there was good faith on the part of the appellant. It is the natural and proximate loss which the plaintiff is to be indemnified for, and that cannot be said to extend to the highest price before trial, but only to the highest price reached within a reasonable time after the plaintiff has learned of the conversion of his stock within which he could go in the market and repurchase it. What is a reasonable time when the facts are undisputed, and different inferences cannot reasonably be drawn from the same facts, is a question of law. See *Colt v. Owens*, 90 N. Y. 368; *Hedges v. Railroad Co.*, 49 N. Y. 223.

We think that beyond all controversy in this case, and taking all the facts into consideration, this reasonable time had expired by July 1, 1878, following the 9th of May of the same year. The highest price which the stock reached during that period was \$2,795, and, as it is not certain on what day the plaintiff might have purchased, we think it fair to give him the highest price it reached in that time. * * * The judgment must be reversed and a new trial granted.⁹

⁹ See, also, *First Nat. Bank v. Red River Nat. Bank*, 9 N. D. 319, 83 N. W. 221 (1900).

The history of the rule laid down in the principal case may be traced by reading *Suydam v. Jenkins*, 3 Sandf. 614 (1850); *Romaine v. Van Allen*, 26 N. Y. 309 (1863); *Burt v. Dutcher*, 34 N. Y. 493 (1866); *Markham v. Jaudon*, 41 N. Y. 236 (1869); *Mathews v. Coe*, 49 N. Y. 57 (1872); *Lobdell v. Stowell*, 51 N. Y. 70 (1872); *Gruman v. Smith*, 81 N. Y. 25 (1880); *Colt v. Owens*, 90 N. Y. 368 (1882).

INGRAM v. RANKIN et al.

(Supreme Court of Wisconsin, 1879. 47 Wis. 406, 2 N. W. 755, 32 Am. Rep. 762.)

TAYLOR, J.¹⁰ This is an action to recover for the value of a quantity of hay, wheat and oats, which the plaintiff claims to own, and which he alleges was wrongfully and unlawfully taken from his possession by the defendants and converted to their use. The plaintiff recovered, and from the judgment entered in his favor the defendants appealed to this court. * * *

The plaintiff had a lease of the land, upon which the hay and grain were raised, from one Hammond. The defendants were judgment creditors of Hammond, and took such hay and grain upon and by virtue of an execution issued upon a judgment against him. * * *

We think the uniform course of decision is that the measure of damages is the value of the property at the time fixed for the delivery, or at the time of the conversion, with interest to the day of trial; the only exception to the rule being that in case of replevin, where the property is in esse, and supposed to be in the hands of the defendant at the time of the trial, and plaintiff recovers, he may recover as his damages the value of the property on the day of trial, excluding any value added to the same by labor or money of the defendant or those under whom he claims. * * *

It is said that the rule giving as damages the highest market value, intermediate the conversion or day of delivery and the day of trial, should be applied to articles of trade and commerce which fluctuate in value from day to day, and that to adhere to rule of value at the time of the conversion would in many cases allow the wrongdoer to make profit out of his own wrong, or at all events it might prevent the plaintiff from taking advantage of a rising market, and thereby might deprive him of his reasonable expectations of profit from his investments.

There can be no force in the argument that the defendant would be allowed to make money out of his own tortious act. If the wrongdoer sells the property which he has unlawfully taken from another, the owner of the property can waive the tort and sue the tort-feasor for the money he has received upon such sale of his property, and thereby prevent him from making a profit out of his wrong. But the rule which allows the plaintiff to recover the highest market value is objectionable, because it allows him to recover speculative damages, especially when a long time elapses between the conversion and the day of trial. In most cases property which rapidly changes in value is not retained in the possession or ownership of one person for a great length of time, and it

¹⁰ Part of the opinion is omitted.

would be a matter of the utmost doubt whether the plaintiff, had he not been deprived of the possession of his property, would have realized the highest market value to which it might have attained during the time of the conversion and the time of trial; and in those cases where the market value is very fluctuating great injustice would be done by this rule to the man who honestly converted such property, in the belief that it was his own, if, after the lapse of five or six years, he should be called upon to pay the highest market value it had attained during the time. The hardship of enforcing this rule in the case of stocks, which is perhaps property of the most unfixed value, forced the Court of Appeals in New York to repudiate the rule, after it had been partially adopted by the courts of that state. * * *

The difficulties and injustice of the rule of the highest market price has led to various modifications of it by the courts which have adopted it, some courts having so modified it as to confine it to the highest price between the date of conversion and the commencement of the action, others to the time of the commencement of the action, provided the action be commenced within a reasonable time, and others between the time of conversion and the time of trial, provided the action be commenced within a reasonable time. * * *

Mr. Field, in his work upon the Law of Damages, after an examination of all the cases, says: "The rule of valuation of the property at the time of the conversion, with interest, prevails in Massachusetts, where there is no claim for special damages, and this general rule has been recognized in Pennsylvania, Kentucky, Missouri, West Virginia, New Hampshire, Connecticut, Maine, Vermont, Illinois, Wisconsin, Louisiana, Mississippi, Nevada, Florida, Delaware, Maryland, Minnesota, New York, Texas and Iowa." * * *

The rule fixing the measure of damages in actions for breaches of contract for the delivery of chattels and in all actions for the wrongful and unlawful taking of chattels, whether the taking was such as would formerly have been denominated trespass de bonis, or trover, at the value of the chattels at the time when delivery ought to have been made, or at the taking or conversion, with interest, is certainly founded upon principle. It harmonizes with the rule which restricts the plaintiff to compensation for his loss, and is as just and equitable as any other general rule which the courts have been able to prescribe, and has greatly the advantage of certainty over all others.

We have concluded, therefore, to adhere to the general rule laid down by this court in the cases cited, and hold that in all actions either upon contract for the non-delivery of goods, or for the tortious taking or conversion of the same, "unless the plaintiff is deprived of some special use of the property anticipated by the

wrongdoer," and in the absence of proof of circumstances which would entitle the plaintiff to recover exemplary or punitive damages, the measure of damages is—first, the value of the chattels at the time and place when and where the same should have been delivered, or of the wrongful taking or conversion, with interest on that sum to the date of trial; second, if it appears that the defendant, in case of a wrongful taking or conversion, has sold the chattels, the plaintiff may, at his election, recover as his damages the amount for which the same were sold, with interest from the time of the sale to the day of trial; third, if it appears that the chattels wrongfully taken or converted are still in the possession of the defendant at the time of the trial, the plaintiff may, at his election, recover the present value of the same at the place where the same were taken or converted, in the form they were in when so taken or converted.

These rules will prevent the defendant from making profit out of his own wrong, will give the plaintiff the benefit of any advance in the price of the chattels when defendant holds possession of the same at the time of the trial, and on the whole be much more equitable than the rule given by the court below. * * *

EXEMPLARY DAMAGES

I. When Recoverable¹

1. IN GENERAL

DURFEE v. NEWKIRK.

(Supreme Court of Michigan, 1890. 83 Mich. 522, 47 N. W. 351.)

MORSE, J.² Plaintiffs brought action in trespass on the case in the Wayne circuit court, alleging that the defendants had sold to them 100 pounds of peppermint oil, representing to them falsely that the same was good and genuine peppermint oil, when in fact it was dementholized oil, from which the active principle of good and genuine peppermint oil, to-wit, menthol, had been eliminated to the knowledge of defendants. The jury returned a verdict for the plaintiffs in the sum of \$350, for which they had judgment. * * *

The defendants claim error on the trial in the following particulars: * * * Fifth. Plaintiffs were not entitled to exemplary damages. * * *

The court, in his instructions as to damages, among other things said: "If you believe from the evidence that Newkirk perpetrated the fraud charged, and that he did it willfully, for the purpose of injuring the plaintiffs as rivals or competitive buyers, you may add to the actual damages as above indicated some reasonable sum as exemplary or punitive damages proportionate to the maliciousness of the act." It has been said by this court that, where the damages are capable of pecuniary estimation, vindictive damages can never be allowed; that for any wrongful injuries where the grievance created is purely pecuniary in its nature, and is susceptible of a full and definite money compensation, it is not permissible to abandon a certain rule which will do complete justice, for an uncertain one that can hardly fail to do injustice. Warren v. Cole, 15 Mich. 273. And in Wilson v. Bowen, 64 Mich. 133, 31 N. W. 81, it is said that it is not the province of the jury after full damages have been found for the plaintiff, so that he is fully compensated for the wrong committed by the defendant, to mulct the defendant in an additional sum to be handed over to the plaintiff

¹ For discussion of principles, see Hale on Damages (2d Ed.) §§ 89, 90.

² Part of the opinion is omitted.

as a punishment for the wrong he has done to such plaintiff. See, also, *Stilson v. Gibbs*, 53 Mich. 280, 18 N. W. 815.

There is a class of cases, such as seduction (see *Watson v. Watson*, 53 Mich. 168, 18 N. W. 605, 51 Am. Rep. 111), when the damages are not capable of accurate measurement by a money standard, and where they must necessarily be left to the proper discretion of the jury. In such cases "increased damages" are permitted for circumstances of aggravation in the wrong-doing, but they are not given by the law, as interpreted by this court, in punishment of the wrong-doer, but as extra compensation to the person wronged, for the reason that the injury is considered greater because of such circumstances of aggravation, and therefore the compensation ought to be greater. Willful trespasses, assaults and batteries, libels and slanders, false imprisonment, and perhaps other actions, where the injury is in part to the feelings of the plaintiff, to his shame and humiliation, are cases where "increased" damages may be given. *Post Co. v. McArthur*, 16 Mich. 447; *Welch v. Ware*, 32 Mich. 77; *Elliott v. Van Buren*, 33 Mich. 56, 20 Am. Rep. 668; *Livingston v. Burroughs*, 33 Mich. 511; *Scripps v. Reilly*, 38 Mich. 10-25; *Ross v. Leggett*, 61 Mich. 452, 453, 28 N. W. 695, 1 Am. St. Rep. 608.

But this is not a case where such damages are admissible. Here the wrong was capable of accurate pecuniary measurement, and the damage to plaintiffs was simply a financial one. The motive of the defendants did not affect the wrong, and their fraud, however premeditated and willful, added nothing to any damages which the plaintiffs were entitled to recover as compensation for the wrong inflicted. But we are not willing to reverse the judgment for this error of the trial court. As it is very plain to us from the testimony that the plaintiffs received no greater amount than was their actual loss on account of the transaction, the judgment will stand. It is not the duty of an appellate court to reverse a judgment, unless it is satisfied that an error has been committed, and that such error has done injustice, or may have been prejudicial to the appellant. In this case, as before shown, the oil purchased was worthless. If it had been as represented, it would have been worth, under the testimony, about \$300. Interest on this amount for three years and two months added would amount to more than the verdict of the jury. It therefore appears that nothing was added in the way of exemplary damages. The judgment is therefore affirmed. * * *

COLE v. GRAY.

(Supreme Court of Kansas, 1905. 70 Kan. 705, 79 Pac. 654.)

Action by F. N. Cole against C. C. Gray. There was judgment for defendant, and plaintiff brings error.

C. A. SMITH, J.³ This action was brought by plaintiff in error against defendant in error, who was the postmaster at Leroy, Coffey county, in the district court of said county, to recover damages for the failure of said postmaster and his assistants to deliver to plaintiff a postal card, addressed to plaintiff, when called for by plaintiff, which had arrived at said post office through the mails, and was therein at the time plaintiff called for same. No actual damages were alleged. The only damage claimed seems to have been for mental pain and anguish in failing to receive notice of the death of the plaintiff's father, and his consequent inability to attend the funeral. The trial was had to a jury. The plaintiff introduced evidence of the arrival of the postal card at the post office at 8 o'clock a. m. of the 16th of the month, and that he called for same five times thereafter before it was delivered to him on the afternoon of the 19th; that a lady (who was admitted to have been assistant postmaster) and a son of defendant were in charge of the post office at these times; that plaintiff was prevented from attending his father's funeral by the failure to deliver said postal card the first time it was called for, on the 16th. The duties or capacity of defendant's son in the post office were not shown, and no actual damages, or, at least, the amount of the actual damages, if any, was not shown. * * *

Assuming that the assistant postmaster and the defendant's son were in charge of the post office for the purpose of delivering mail, and by employment of the defendant, and not as appointed officials of the government, the evidence tended to show gross, if not wanton, negligence; and if any amount of actual damages had been alleged and proven, as the evidence indicates there might have been, such damages might have been recovered, and, in addition thereto, exemplary or punitive damages also might have been recovered. Exemplary damages, however, cannot be recovered in the absence of actual damages. *West v. Telegraph Co.*, 39 Kan. 93-99, 17 Pac. 807, 7 Am. St. Rep. 530, and cases there cited.

Damages for mental suffering and anguish can only be recovered—and this seems to be the only damages alleged or proven in this case—where the same are consequent to physical injuries. *Id.* * * * The judgment will be affirmed.

³ Part of the opinion is omitted.

ALABAMA G. S. R. CO. v. SELLERS.

(Supreme Court of Alabama, 1891. 93 Ala. 9, 9 South. 375, 30 Am. St. Rep. 17.)

Action by Nancy M. Sellers and her husband against the Alabama Great Southern Railroad Company to recover damages for personal injuries to the plaintiff caused by the wrongful act of defendant's employes. There was judgment for plaintiff, and defendant appeals.

McCLELLAN, J.* The inquiry of chief importance in this case is whether there was any testimony adduced which, if believed, would have authorized the imposition of exemplary damages. We think there was such testimony. The plaintiff (appellee here) testified in her own behalf that she purchased a ticket entitling her to transportation on a freight train of the defendant from Jonesboro to Wheeling, stations on defendant's road about two miles apart, and took passage on such train at Jonesboro; that at Wheeling there was a house used as a station-house by all passengers to and from that point over defendant's line, and at which defendant's trains carrying passengers were wont to stop for the purpose of receiving and discharging passengers; that on the occasion in question the train was not stopped at said station, but proceeded from 200 to 400 yards beyond it; that it was raining at the time; that plaintiff requested the conductor to move the train back to the house, but he pretended not to hear, and told plaintiff she must get off; that the rain increased, and was falling heavily, and a high wind was prevailing, when she did get off; that she had a young baby in her arms, and was otherwise incumbered with a valise; that because of these impediments she could not use efficiently an umbrella which she had; that she alighted in obedience to the direction of the conductor in this driving rain, and walked back to the station-house, getting thoroughly wet, and in consequence became quite sick, and was so for three months.

The testimony of the conductor goes to show that the house in question was used as a station-house by his company; and, even on the evidence of the defendant, there can be no doubt that it was the duty of the defendant to stop this train at the house and allow passengers to alight there notwithstanding the house belonged to another company. *Railroad Co. v. Johnston*, 79 Ala. 436. If the jury believed the testimony we have detailed, they would have been justified in the conclusion that defendant's conductor, within the range of his employment, willfully refused to move the train back to the station, and willfully compelled the plaintiff to alight in the driving rain, several hundred yards from

* Part of the opinion is omitted and the statement of facts is rewritten.

any shelter, so incumbered with her child and baggage as to be unable to protect herself, and necessitating exposure to the elements while walking this distance. We cannot hesitate to affirm that this misconduct on the part of defendant's employé, with knowledge of the situation, was such a willful wrong, committed in such reckless disregard of the necessarily injurious consequences to the plaintiff, as authorized the jury to punish the defendant therefor by the imposition of exemplary damages. *Railroad Co. v. Hurst*, 36 Miss. 660, 668, 669, 74 Am. Dec. 785; *Wilkinson v. Searcy*, 76 Ala. 176; *Railroad Co. v. Frazier*, 93 Ala. 45, 9 South. 303, 30 Am. St. Rep. 28. * * *

There are respectable authorities which appear to hold that exemplary damages cannot be awarded when the actual injury is purely nominal, the theory being that as exemplary damages are laid in conservation of the interests of society, which for this purpose are considered "as blended with the interests of the individual," where the individual is injured only nominally or not at all in fact, though his rights are violated, "the interests of society have virtually nothing to blend with;" and hence, "the individual having but a nominal interest, society can have none," etc. *Stacy v. Publishing Co.*, 68 Me. 287. This view is specious, but, we apprehend, not sound. The true theory of exemplary damages is that of punishment, involving the ideas of retribution for willful misconduct, and an example to deter from its repetition. The position of the supreme court of Maine, can be sustained in principle, it seems to us, only by assuming that which is manifestly untrue, namely, that no act is criminal which does not inflict individual injury capable of being measured and compensated for in money. Many acts denounced as crime by our statutes, or by the common law, involve no pecuniary injury to the individual against whom they are directed, and which, while the party aggrieved could not recover damages as compensation beyond a merely nominal sum, are yet punished in the criminal courts, and may also be punished in civil actions by the imposition of "smart money;" and, on the same principle, acts readily conceivable which involve malice, willfulness, or wanton and reckless disregard of the rights of others, though not within the calendar of crime, and inflicting no pecuniary loss or detriment, measurable by a money standard, on the individual, yet merit such punishment as the civil courts may inflict by the imposition of exemplary damages. And upon these considerations the law is, and has long been, settled in this state that the infliction of actual damage is not an essential predicate to the imposition of exemplary damages. *Parker v. Mise*, 27 Ala. 480, 62 Am. Dec. 776; *Telegraph Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; *Railroad Co. v. Heddleston*, 82 Ala. 218, 3 South. 53. See, also, 1 Suth. Dam. 748.

The charges requested by the defendant to the effect that actual damage must be shown before punitive damages could be recovered were therefore properly refused. * * * The judgment is affirmed.

PRINCE v. STATE MUT. LIFE INS. CO.

(Supreme Court of South Carolina, 1907. 77 S. C. 187, 57 S. E. 766.)

Action by Albert I. Prince against the State Mutual Life Insurance Company. There was judgment for the plaintiff for \$500, and defendant appeals.

POPE, C. J.⁵ * * * The plaintiff sought to recover damages for the alleged failure of the defendant to issue to him a 10-year policy of insurance on plaintiff's life. The allegations of the complaint are, in substance, as follows: That on the 5th day of May, 1905, in consideration of the sum of \$15.43, the defendant agreed to execute and deliver to the plaintiff its policy of insurance upon his life in the sum of \$1,000, and in case of plaintiff's death to be payable to his wife. That said policy was to mature in 10 years, and at the end of that time, plaintiff, if living, would receive the sum of \$1,000, and in case of his death the beneficiary would receive that amount; provided the premiums were paid as they became due. That plaintiff paid the first premium and received a receipt therefor, stood his physical examination, and, under the agreement above set forth, was accepted as an insurable risk by defendant. That, although he has performed his part of the contract in full, defendant refused to issue said 10-year policy, but, instead, willfully and wantonly attempted to compel plaintiff to accept another policy of insurance by threatening plaintiff with imprisonment. The answer was a general denial. * * *

The first alleged error is the refusal of the court to direct a verdict for defendant, on the grounds: (1) That there was no evidence that Mr. McKee was the agent of defendant company; (2) that there was absolutely no element of damages shown. As to the first ground, we think the refusal of the presiding judge was proper. It is well settled that where there is any evidence at all it must go to the jury. * * * While it is true, mere declarations of a person are not proof of his agency, yet there is other evidence to warrant the question being submitted to the jury.

Nor are we prepared to say that in this case there were no actual damages. It is undisputed that plaintiff gave his note to the company, and that it is still an outstanding liability. True, plaintiff has not paid anything on the note, but the defendant refuses to give it up. In the application set out in the case, as in

⁵ Part of the opinion is omitted.

some applications, it was not agreed that the premium should be forfeited and go to pay the company for trouble and expense in issuing the policy if the applicant refused to accept the same when issued. It was therefore the duty of the defendant to surrender the note after the failure to complete the contract. This note was received as cash, and while outstanding it, as it were, reduced the plaintiff's credit to that extent. We think the circuit judge was correct in holding this to be some element of damage sufficient to take the case to the jury.

Assuming, but not holding, that McKee was the agent of the company, and having power to bind it by contract, we proceed to consider whether the application for insurance was a part of the contract of insurance and binding on the plaintiff. That the application is a part of the contract seems to be well settled by authority. Cooley, in his *Briefs on the Law of Insurance* (volume 1, p. 676), says: "For the general purposes of construction, an application will be considered a part of the contract, if it is referred to in the policy in such a way as to indicate a clear intent to make it a part thereof." He quotes many cases supporting this view. * * * This being so, was the application "a part of the insurance contract with defendant company" binding on the plaintiff? He testified to certain oral declarations made to him by McKee and to the oral agreement made between them. Granting all this to be true, it does not follow that the defendant is liable for such agreement. The proposition of law is elementary that, where a previous oral agreement is reduced to writing, the oral agreement is entirely merged into the written agreement. Mr. Page, in his recent work on *Contracts* (section 1189), thus states the rule, which is supported by abundant authority: "If the parties to a contract have reduced it to writing, they must intend such writing to be the repository of their common intention. It merges all prior and contemporaneous negotiations." * * *

The final question for consideration is whether or not punitive damages are recoverable in this case. We have above reached the conclusion that the application was a part of the contract. Therefore this action is an action on contract, and, unless fraud is alleged and proved, punitive damages cannot be recovered for the breach. The general rule is thus stated in *Sedgwick on Damages* (8th Ed.) § 603: "It may be considered to be established that the motives of the defendant in breaking his contract are to be disregarded, and consequently exemplary damages are not recoverable." In this state, however, in the early case of *Rose v. Beattie*, 2 Nott. & McC. 538, the doctrine was suggested that, where a breach of contract is accompanied with a fraudulent act, punitive damages are recoverable, but not for a breach unaccompanied by fraud. This principle has been recently laid down as the law in

the case of *Welborn v. Dixon*, 70 S. C. 108, 49 S. E. 232. As no fraudulent act is here alleged, exemplary damages cannot be recovered.

It is the judgment of this court that the judgment of the circuit court be reversed, unless plaintiff surrender all of the judgment except \$15.43, the amount of the note given by plaintiff to defendant.

2. TORTS WHICH ARE ALSO CRIMES

HAUSER v. GRIFFITH.

(Supreme Court of Iowa, 1897. 102 Iowa, 215, 71 N. W. 223.)

Action for damages for an assault and battery. Judgment for plaintiff, and defendant appeals.

GRANGER, J.^o * * * The jury was permitted to find exemplary damages. It appeared in the trial of this case that in the criminal suit a fine was imposed and paid. It is urged that that fact should defeat an allowance of exemplary damages in this case, because otherwise there is a double punishment. That the claim has strong support in reason hardly admits of doubt, but a contrary rule seems to have obtained in this state since the case of *Hendrickson v. Kingsbury*, reported in 21 Iowa, 379. Each party has seized upon particular language in that case for support of his claim; but, when all the language is considered, it makes the distinction between the punishment for the wrong done the public, for which the punishment is inflicted in the criminal action, and that done to the individual, for which punishment may be imposed by the jury in the civil action. *Reddin v. Gates*, 52 Iowa, 210, 2 N. W. 1079, is like this case in its facts, and conclusive of it. See, also, *Root v. Sturdivant*, 70 Iowa, 55, 29 N. W. 802. That other states have announced a different rule is true, but a review of the cases would be of no use. * * * The judgment is affirmed.

° Part of the opinion is omitted.

H. Liability of Principal for Act of Agent⁷

GODDARD v. GRAND TRUNK RY. OF CANADA.

(Supreme Judicial Court of Maine, 1869. 57 Me. 202, 2 Am. Rep. 39.)

Action against the Grand Trunk Railway of Canada to recover damages for an assault made on a passenger by a brakeman in defendant's employment. Verdict for \$4,850.

WALTON, J.⁸ Two questions are presented for our consideration: First, is the common carrier of passengers responsible for the willful misconduct of his servant? or, in other words, if a passenger who has done nothing to forfeit his right to civil treatment, is assaulted and grossly insulted by one of the carrier's servants, can he look to the carrier for redress? and, secondly, if he can, what is the measure of relief which the law secures to him? These are questions that deeply concern, not only the numerous railroad and steamboat companies engaged in the transportation of passengers, but also the whole traveling public; and we have endeavored to give them that consideration which their great importance has seemed to us to demand. * * *

It appears in evidence, that the plaintiff was a passenger in the defendants' railway car; that, on request, he surrendered his ticket to a brakeman employed on the train, who, in the absence of the conductor, was authorized to demand and receive it; that the brakeman afterwards approached the plaintiff, and, in language coarse, profane, and grossly insulting, denied that he had either surrendered or shown him his ticket; that the brakeman called the plaintiff a liar, charged him with attempting to avoid the payment of his fare, and with having done the same thing before, and threatened to split his head open and spill his brains right there on the spot; that the brakeman stepped forward and placed his foot upon the seat on which the plaintiff was sitting, and, leaning over the plaintiff, brought his fist close down to his face, and shaking it violently, told him not to yip, if he did he would spot him, that he was a damned liar, that he never handed him his ticket, that he did not believe he paid his fare either way; that this assault was continued some fifteen or twenty minutes, and until the whistle sounded for the next station; that there were several passengers present in the car, some of whom were ladies, and that they were all strangers to the plaintiff; that the plaintiff was at the time in feeble health, and had been for some time under the care of a physician, and at the time of the assault was reclining languidly in

⁷ For discussion of principles, see Hale on Damages (2d Ed.) § 91.

⁸ Part of the opinion is omitted.

his seat; that he had neither said nor done anything to provoke the assault; that, in fact, he had paid his fare, had received a ticket, and had surrendered it to this very brakeman who delivered it to the conductor only a few minutes before, by whom it was afterwards produced and identified: that the defendants were immediately notified of the misconduct of the brakeman, but, instead of discharging him, retained him in his place; that the brakeman was still in the defendants' employ when the case was tried and was present in court during the trial, but was not called as a witness, and no attempt was made to justify or excuse his conduct.

Upon this evidence the defendants contend that they are not liable, because, as they say, the brakeman's assault upon the plaintiff was willful and malicious, and was not directly nor impliedly authorized by them. They say the substance of the whole case is this, that "the master is not responsible as a trespasser, unless by direct or implied authority to the servant, he consents to the unlawful act." * * *

What is the measure of relief which the law secures to the injured party; or, in other words, can he recover exemplary damages? We hold that he can. The right of the jury to give exemplary damages for injuries wantonly, recklessly, or maliciously inflicted, is as old as the right of trial by jury itself; and is not, as many seem to suppose, an innovation upon the rules of the common law. It was settled in England more than a century ago.
* * *

But it is said that if the doctrine of exemplary damages must be regarded as established in suits against natural persons for their own willful and malicious torts, it ought not to be applied to corporations for the torts of their servants, especially where the tort is committed by a servant of so low a grade as a brakeman on a railway train, and the tortious act was not directly or impliedly authorized nor ratified by the corporation; and several cases are cited by the defendants' counsel, in which the courts seem to have taken this view of the law; but we have carefully examined these cases, and in none of them was there any evidence that the servant acted wantonly or maliciously; these were simply cases of mistaken duty; and what these same courts would have done if a case of such gross and outrageous insult had been before them, as is now before us, it is impossible to say; and long experience has shown that nothing is more dangerous than to rely upon the abstract reasoning of courts, when the cases before them did not call for the application of the doctrines which their reasoning is intended to establish.

We have given to this objection much consideration, as it was our duty to do, for the presiding judge declined to instruct the jury that if the acts and words of the defendants' servant were not directly nor impliedly authorized nor ratified by the defendant, the

plaintiff could not recover exemplary damages. We confess that it seems to us that there is no class of cases where the doctrine of exemplary damages can be more beneficially applied than to railroad corporations in their capacity of common carriers of passengers; and it might as well not be applied to them at all as to limit its application to cases where the servant is directly or impliedly commanded by the corporation to maltreat and insult a passenger, or to cases where such an act is directly or impliedly ratified; for no such cases will ever occur. A corporation is an imaginary being. It has no mind but the mind of its servants; it has no voice but the voice of its servants; and it has no hands with which to act but the hands of its servants. All its schemes of mischief, as well as its schemes of public enterprise, are conceived by human minds and executed by human hands; and these minds and hands are its servants' minds and hands. All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant and the malice of the corporation; or the punishment of the servant and the punishment of the corporation, is sheer nonsense; and only tends to confuse the mind and confound the judgment. Neither guilt, malice, nor suffering is predicable of this ideal existence, called a corporation. And yet under cover of its name and authority, there is in fact as much wickedness, and as much that is deserving of punishment, as can be found anywhere else. And since these ideal existences can neither be hung, imprisoned, whipped, or put in the stocks—since in fact no corrective influence can be brought to bear upon them except that of pecuniary loss—it does seem to us that the doctrine of exemplary damages is more beneficial in its application to them, than in its application to natural persons. If those who are in the habit of thinking that it is a terrible hardship to punish an innocent corporation for the wickedness of its agents and servants, will for a moment reflect upon the absurdity of their own thoughts, their anxiety will be cured. Careful engineers can be selected who will not run their trains into open draws; and careful baggage men can be secured, who will not handle and smash trunks and hand-boxes as is now the universal custom; and conductors and brakemen can be had who will not assault and insult passengers; and if the courts will only let the verdicts of upright and intelligent juries alone, and let the doctrine of exemplary damages have its legitimate influence, we predict these great and growing evils will be very much lessened, if not entirely cured. There is but one vulnerable point about these ideal existences, called corporations; and that is, the pocket of the monied power that is concealed behind them; and if that is reached they will wince. When it is thoroughly understood that it is not profitable to employ careless and indifferent agents, or reckless and insolent servants, better men will take their places, and not before.

It is our judgment, therefore, that actions against corporations, for the willful and malicious acts of their agents and servants in executing the business of the corporation, should not form exceptions to the rule allowing exemplary damages. On the contrary, we think this is the very class of cases, of all others, where it will do the most good, and where it is most needed. And in this conclusion we are sustained by several of the ablest courts in the country. * * *

But the defendants say that the damages awarded by the jury are excessive, and they move to have the verdict set aside and a new trial granted for that reason. That the verdict in this case is highly punitive, and was so designed by the jury, cannot be doubted: but by whose judgment is it to be measured to determine whether or not it is excessive? What standard shall be used?

* * * It is the wisdom of the law to suppose that the judgment of the jury is more likely to be right than the judgment of the court, for it is to the former and not to the latter that the duty of estimating damages is confided. Unless the damages are so large as to satisfy the court that the verdict was not the result of an honest exercise of judgment, they have no right to set it aside.

A careful examination of the case fails to satisfy us that the jury acted dishonestly, or that they made any mistake in their application of the doctrine of exemplary damages. We have no doubt that the highly punitive character of their verdict is owing to the fact that, after Jackson's misconduct was known to the defendants, they still retained him in their service. The jury undoubtedly felt that it was due to the plaintiff, and due to every other traveler upon that road, to have him instantly discharged; and that to retain him in his place, and thus shield and protect him against the protestation of the plaintiff, made to the servant himself at the time of the assault, that he would lose his place, was a practical ratification and approval of the servant's conduct, and would be so understood by him and by every other servant on the road.

* * *

It will be an impressive lesson to these defendants, and to the managers of other lines of public travel, of the risk they incur when they retain in their service servants known to be reckless, ill-mannered, and unfit for their places. And it will encourage those who may suffer insult and violence at the hands of such servants, not to retaliate or attempt to become their own avengers, as is too often done, but to trust to the law and to the courts of justice, for the redress of their grievances. It will say to them, be patient and law-abiding, and your redress shall surely come, and in such measure as will not add insult to your previous injury. * * * 9

9 See, also, *Little Rock Ry. & Electric Co. v. Dobbins*, post, p. 224.

LAKE SHORE & M. S. RY. CO. v. PRENTICE.

(Supreme Court of the United States, 1893. 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97.)

On October 12, 1886, the plaintiff, his wife, and a number of other persons were passengers, holding excursion tickets, on a regular passenger train of the defendant's railroad, from Norwalk, in Ohio, to Chicago, in Illinois. During the journey the plaintiff purchased of several passengers their return tickets, which had nothing on them to show that they were not transferable. The conductor of the train, learning this, and knowing that the plaintiff had been guilty of no offense for which he was liable to arrest, telegraphed for a police officer, an employé of the defendant, who boarded the train as it approached Chicago. The conductor thereupon, in a loud and angry voice, pointed out the plaintiff to the officer, and ordered his arrest; and the officer, by direction of the conductor, and without any warrant or authority of law, seized the plaintiff, and rudely searched him for weapons in the presence of the other passengers, hurried him into another car, and there sat down by him as a watch, and refused to tell him the cause of his arrest, or to let him speak to his wife. While the plaintiff was being removed into the other car, the conductor, for the purpose of disgracing and humiliating him with his fellow passengers, openly declared that he was under arrest, and sneeringly said to the plaintiff's wife, "Where's your doctor now?" On arrival at Chicago, the conductor refused to let the plaintiff assist his wife with her parcels in leaving the train, or to give her the check for their trunk; and, in the presence of the passengers and others, ordered him to be taken to the station house, and he was forcibly taken there, and detained until the conductor arrived; and knowing that the plaintiff had been guilty of no offense, entered a false charge against him of disorderly conduct, upon which he gave bail and was released, and of which, on appearing before a justice of the peace for trial on the next day, and no one appearing to prosecute him, he was finally discharged.

GRAY, J.¹⁰ * * * The single question presented for our decision, is whether a railroad corporation can be charged with punitive or exemplary damages for the illegal, wanton, and oppressive conduct of a conductor of one of its trains towards a passenger.
* * *

Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore,

¹⁰ Part of the opinion is omitted.

though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent on the part of the agent. This is clearly shown by the judgment of this court in the case of *The Amiable Nancy*, 3 Wheat. 546, 4 L. Ed. 456. * * *

The rule thus laid down is not peculiar to courts of admiralty; for, as stated by the same eminent judge two years later, those courts proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages, as well as damages by way of compensation or remuneration for expenses incurred, or injuries or losses sustained, by the misconduct of the other party. *Manufacturing Co. v. Fiske*, 2 Mason, 119, 121, Fed. Cas. No. 1,681. In *Keene v. Lizardi*, 8 La. 26, 33, Judge Martin said: "It is true, juries sometimes very properly give what is called 'smart money.' They are often warranted in giving vindictive damages as a punishment inflicted for outrageous conduct; but this is only justifiable in an action against the wrongdoer, and not against persons who, on account of their relation to the offender, are only consequentially liable for his acts, as the principal is responsible for the acts of his factor or agent." * * *

The rule has the same application to corporations as to individuals. This court has often, in cases of this class, as well as in other cases, affirmed the doctrine that for acts done by the agents of a corporation, in the course of its business and of their employment, the corporation is responsible in the same manner and to the same extent as an individual is responsible under similar circumstances. * * *

A corporation is doubtless liable, like an individual, to make compensation for any tort committed by an agent in the course of his employment, although the act is done wantonly and recklessly, or against the express orders of the principal. *Railroad Co. v. Derby*, 14 How. 468, 14 L. Ed. 502; *Steamboat Co. v. Brockett*, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1049; *Howe v. Newmarch*, 12 Allen (Mass.) 49; *Ramsden v. Railroad Co.*, 104 Mass. 117, 6 Am. Rep. 200. A corporation may even be held liable for a libel, or a malicious prosecution, by its agent within the scope of his employment; and the malice necessary to support either action if proved in the agent, may be imputed to the corporation. * * * But, as well observed by Mr. Justice Field, now Chief Justice of Massachusetts: "The logical difficulty of imputing the actual malice or fraud of an agent to his principal is perhaps less when the principal is the person than when it is a corporation; still the foundation of the imputation is not that it is inferred that the principal actually participated in the malice or fraud, but, the act having been done for his benefit by his agent acting within the scope of his employment in his business, it is just that he should be held responsible for it in

damages." *Lothrop v. Adams*, 133 Mass. 471, 480, 481, 43 Am. Rep. 528.

Though the principal is liable to make compensation for a libel published or a malicious prosecution instituted by his agent, he is not liable to be punished by exemplary damages for an intent in which he did not participate. In *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447, in *Eviston v. Cramer*, 57 Wis. 570, 15 N. W. 760, and in *Haines v. Schultz*, 50 N. J. Law, 481, 14 Atl. 488, above cited, it was held that the publisher of a newspaper, when sued for a libel published therein by one of his reporters without his knowledge, was liable for compensatory damages only, and not for punitive damages, unless he approved or ratified the publication; and in *Haines v. Schultz* the Supreme Court of New Jersey said of punitive damages: "The right to award them rests primarily upon the single ground—wrongful motive." "It is the wrongful personal intention to injure that calls forth the penalty. To this wrongful intent knowledge is an essential prerequisite." "Absence of all proof bearing on the essential question, to wit, defendant's motive, cannot be permitted to take the place of evidence, without leading to a most dangerous extension of the doctrine *respondet superior*." 50 N. J. Law, 484, 485, 14 Atl. 488, 489. Whether a principal can be criminally prosecuted for a libel published by his agent without his participation is a question on which the authorities are not agreed; and, where it has been held that he can, it is admitted to be an anomaly in the criminal law. * * *

No doubt, a corporation, like a natural person, may be held liable in exemplary or punitive damages for the act of an agent within the scope of his employment, provided the criminal intent, necessary to warrant the imposition of such damages, is brought home to the corporation. * * *

Independently of this, in the case of a corporation, as of an individual, if any wantonness or mischief on the part of the agent, acting within the scope of his employment, causes additional injury to the plaintiff in body or mind, the principal is, of course, liable to make compensation for the whole injury suffered. * * *

In the case at bar, the defendant's counsel having admitted in open court "that the arrest of the plaintiff was wrongful, and that he was entitled to recover actual damages therefor," the jury were rightly instructed that he was entitled to a verdict which would fully compensate him for the injuries sustained, and that in compensating him the jury were authorized to go beyond his outlay in and about this suit, and to consider the humiliation and outrage to which he had been subjected by arresting him publicly without warrant and without cause, and by the conduct of the conductor, such as his remark to the plaintiff's wife.

But the court, going beyond this, distinctly instructed the jury that, "after agreeing upon the amount which will fully compensate

the plaintiff for his outlay and injured feelings," they might "add something by way of punitive damages against the defendant, which is sometimes called 'smart money,' " if they were "satisfied that the conductor's conduct was illegal, wanton, and oppressive."

The jury were thus told, in the plainest terms, that the corporation was responsible in punitive damages for wantonness and oppression on the part of the conductor, although not actually participated in by the corporation. This ruling appears to us to be inconsistent with the principles above stated, unsupported by any decision of this court, and opposed to the preponderance of well-considered precedents. * * *

The president and general manager, or, in his absence, the vice president in his place, actually wielding the whole executive power of the corporation, may well be treated as so far representing the corporation and identified with it that any wanton, malicious, or oppressive intent of his, in doing wrongful acts in behalf of the corporation to the injury of others, may be treated as the intent of the corporation itself; but the conductor of a train, or other subordinate agent or servant of a railroad corporation, occupies a very different position, and is no more identified with his principal, so as to affect the latter with his own unlawful and criminal intent, than any agent or servant standing in a corresponding relation to natural persons carrying on a manufactory, a mine, or a house of trade or commerce.

The law applicable to this case has been found nowhere better stated than by Mr. Justice Brayton, afterwards Chief Justice of Rhode Island, in the earliest reported case of the kind, in which a passenger sued a railroad corporation for his wrongful expulsion from a train by the conductor, and recovered a verdict, but excepted to an instruction to the jury that "punitive or vindictive damages, or smart money, were not to be allowed as against the principal, unless the principal participated in the wrongful act of the agent, expressly or impliedly, by his conduct authorizing it or approving it, either before or after it was committed." This instruction was held to be right, for the following reasons: "In cases where punitive or exemplary damages have been assessed, it has been done, upon evidence of such willfulness, recklessness, or wickedness, on the part of the party at fault, as amounted to criminality, which for the good of society and warning to the individual, ought to be punished. If in such cases, or in any case of a civil nature, it is the policy of the law to visit upon the offender such exemplary damages as will operate as punishment, and teach the lesson of caution to prevent a repetition of criminality, yet we do not see how such damages can be allowed, where the principal is prosecuted for the tortious act of his servant, unless there is proof in the cause to implicate the principal and make him particeps criminis of his agent's act. No man should be punished for that

of which he is not guilty." "Where the proof does not implicate the principal, and, however wicked the servant may have been, the principal neither expressly nor impliedly authorizes or ratifies the act, and the criminality of it is as much against him as against any other member of society, we think it is quite enough that he shall be liable in compensatory damages for the injury sustained in consequence of the wrongful act of a person acting as his servant." *Hagan v. Railroad Co.*, 3 R. I. 88, 91, 62 Am. Dec. 377. * * *

It must be admitted that there is a wide divergence in the decisions of the state courts upon this question, and that corporations have been held liable for such damages under similar circumstances in New Hampshire, in Maine, and in many of the Western and Southern states. But of the three leading cases on that side of the question, *Hopkins v. Railroad Co.*, 36 N. H. 9, 72 Am. Dec. 287, can hardly be reconciled with the later decisions in *Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270, and *Bixby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475; and in *Goddard v. Railway Co.*, 57 Me. 202, 228, 2 Am. Rep. 39, and *Railway Co. v. Dunn*, 19 Ohio St. 162, 590, 2 Am. Rep. 382, there were strong dissenting opinions. In many, if not most, of the other cases, either corporations were put upon different grounds in this respect from other principals, or else the distinction between imputing to the corporation such wrongful act and intent as would render it liable to make compensation to the person injured, and imputing to the corporation the intent necessary to be established in order to subject it to exemplary damages by way of punishment, was overlooked or disregarded.

Most of the cases on both sides of the question, not specifically cited above, are collected in 1 Sedg. Dam. (8th Ed.) § 380.

In the case at bar, the plaintiff does not appear to have contended at the trial, or to have introduced any evidence tending to show, that the conductor was known to the defendant to be an unsuitable person in any respect, or that the defendant in any way participated in, approved, or ratified his treatment of the plaintiff; nor did the instructions given to the jury require them to be satisfied of any such fact before awarding punitive damages; but the only fact which they were required to find, in order to support a claim for punitive damages against the corporation, was that the conductor's illegal conduct was wanton and oppressive. For this error, as we cannot know how much of the verdict was intended by the jury as a compensation for the plaintiff's injury, and how much by way of punishing the corporation for an intent in which it had no part, the judgment must be reversed. * * *

PLEADING AND PRACTICE

I. Allegation of Damage—The *Ad Damnum*¹

DAVIS v. BOWERS GRANITE CO.

(Supreme Court of Vermont, 1903. 75 Vt. 286, 54 Atl. 1084.)

Trespass, with a count in trover, by Chas. R. Davis against the Bowers Granite Company. There was judgment for plaintiff and defendant brings exceptions.

WATSON, J.² This action is trespass *de bonis asportatis*, with a count in trover for a horse and wagon. The *ad damnum* is \$200. The taking and conversion were on the 3d day of September, 1894. There was no evidence that the property was worth at the time of the conversion more than \$185, nor to show any damages in excess of that sum. The jury returned a verdict for the plaintiff to recover \$204.05. After verdict, and before judgment, the plaintiff was permitted to remit so much of the verdict as was in excess of \$200. The defendant moved that the verdict be set aside on the ground that it was not warranted by the evidence, and that it was in contradiction of it. After the plaintiff filed his remittitur, the defendant's motion was overruled, and judgment rendered for the plaintiff for \$200. To this the defendant excepted, and thereon he now contends that, as there was no evidence of any damages in excess of \$185, the remittitur, if allowed, should have been for all in excess of that sum.

In assessing the damages, it was legitimate for the jury to consider not only the value of the property at the time of the conversion, but also the time which had elapsed since the conversion, to determine the fair compensation to the plaintiff for his injury. *Clement v. Spear*, 56 Vt. 401. Under this rule it cannot be said that the damages found were not warranted by the evidence and circumstances of the case, but, this action being one sounding merely in damages, the plaintiff could recover no greater sum than he had declared for. It was within the province of the court to allow the plaintiff to reduce his verdict to that sum by a remittitur, and then to render judgment accordingly. *Tarbell v. Tarbell*, 60 Vt. 486, 15 Atl. 104; *Crampton v. Valido Marble Co.*, 60 Vt. 291, 15 Atl. 153, 1 L. R. A. 120. * * * Judgment affirmed.³

¹ For discussion of principles, see *Hale on Damages* (2d Ed.) § 92.

² Part of the opinion is omitted.

³ That plaintiff cannot recover in excess of amount claimed, see *McDermott v. Severe*, ante, p. 110.

II. Allegation of Damage—Form of Statement *

WEST CHICAGO STREET R. CO. v. LEVY.

(Supreme Court of Illinois, 1899. 182 Ill. 525, 55 N. E. 554.)

Action by Emanuel Levy against the West Chicago Street Railroad Company. From a judgment of the appellate court affirming a judgment for plaintiff (82 Ill. App. 202), defendant appeals.

CARTER, J.⁵ This is an appeal from a judgment of the appellate court affirming a judgment of the circuit court of Cook county against appellant for a personal injury. Appellee was driving in a buggy on Robey street when appellant's electric car came up from behind and struck the buggy, threw appellee out, and injured him. Respecting the injury and damages, the declaration alleged that the plaintiff "was severely and dangerously cut, bruised, wounded, and injured, both internally and externally; that plaintiff's back and spine and brain were thereby then and there severely and dangerously and permanently injured, and divers bones of his body, arms, and limbs were then and there and thereby fractured and broken, and plaintiff was otherwise severely, dangerously, and permanently injured, both internally and externally"; that, on account of said injuries, "plaintiff became sick, sore, lame, disordered, and injured, and so remained for a long space of time, during which said time he suffered great bodily pain and mental anguish, and still is languishing and intensely suffering in body and in mind, and in future will continue to suffer, from the effect of said injuries, for the rest of his natural life." And the principal assignment of errors relied on is that the court permitted the plaintiff to prove that one of the effects of his injuries was atrophy of the optic nerve, and consequent impairment of his eyesight. The contention is that the evidence showed that this condition of the optic nerve was produced by defective nutrition, and not by any direct injury it received in the accident; that it was not the natural and necessary result of the injury; and could not, therefore, be proved under the allegation of general damages; and, not having been alleged as special damages, could not be proved at all.

We are of the opinion that the evidence was properly admitted, under the allegations. It is not necessary to allege specially every injury to each part of the body, in actions of this character, in order to prove them on the trial. Injury to the back, spine, and brain was alleged, and the evidence tended to show that such injury was the natural and proximate cause of the defective nutrition

* For discussion of principles, see Hale on Damages (2d Ed.) §§ 93-95.

⁵ Part of the opinion is omitted.

to the optic nerve and impairment of the plaintiff's eyesight. The damages claimed, therefore, were not special, but general, and could be recovered without being declared for specially. See *Railway Co. v. Ward*, 135 Ill. 511, 26 N. E. 520; *Railroad Co. v. Meech*, 163 Ill. 305, 45 N. E. 290; *Railroad Co. v. Brown*, 178 Ill. 187, 52 N. E. 864; *Tyson v. Booth*, 100 Mass. 258; *Railway Co. v. Slanker*, 180 Ill. 357, 54 N. E. 309. * * *

There was no error committed in the instructions, and we cannot reverse the judgment because it may appear that the damages are excessive. The judgment of the appellate court is affirmed.⁶

HEISTER v. LOOMIS.

(Supreme Court of Michigan, 1881. 47 Mich. 16, 10 N. W. 60.)

COOLEY, J.⁷ Loomis sued Heister in trespass for an assault and battery. * * * On the cross-examination of the plaintiff, defendant sought to show that, on the previous Sunday evening in passing his house the plaintiff had stopped in front of it and used vile and abusive language to his wife. Repeated questions put for this purpose were objected to by the plaintiff and ruled out. This ruling was correct. The language attributed to the plaintiff was exceedingly provoking, and if a battery had followed immediately, a jury might possibly have excused it, or dealt with it leniently. But the law does not and cannot, consistent with the safety of society, admit the provocation of words as an excuse for blows given, after the blood has had time and opportunity to cool. To do so would be to encourage parties injured or thinking themselves injured by the misconduct of others, to take into their own hands the punishment of the offender, and violence would beget violence, as each party measured out according to the vehemence of his passion the punishment which he thought or imagined his enemy deserved. The safer view for society and the violated law is to consider the fact that a battery has been committed in revenge for a previous wrong, as an aggravation of the fault, instead of an excuse for it.

The most important question in the case is whether the court correctly admitted certain evidence of special damages. The declaration averred that the plaintiff, because of the wounds, bruises and injuries inflicted upon him by the defendant "was greatly hindered and prevented from doing and performing his work and business and looking after and attending his necessary affairs and avocations for a long space of time," etc. The plaintiff testified

⁶ As to what are special damages, see, also, *Gronan v. Kukkuck*, ante, p. 127. *

⁷ Part of the opinion is omitted.

that his business was that of a farmer; and under objection he was permitted to state that his farm was a grass farm; that when assaulted he was about half through cutting his hay; that he was bothered some about help, and that the cutting was delayed because of his injury, and that his crop of hay was damaged in consequence at least \$50. The defendant contends that this evidence of injury to his hay was inadmissible, because the declaration contained no special averments which would fairly apprise the defendant of the purpose to offer it.

We have been very liberal in this state in receiving evidence of special injuries when the declaration averred them; much more so than the courts of some other states. The cases of *Chandler v. Allison*, 10 Mich. 460; *Allison v. Chandler*, 11 Mich. 542; *Gilbert v. Kennedy*, 22 Mich. 117; and *Welch v. Ware*, 32 Mich. 77, will sufficiently attest the fact. The difference in the rules applicable in cases of contract and tort has also been carefully marked and emphasized. Where only a breach of contract is involved, the defendant is not to be made liable for damages beyond what may fairly be presumed to have been contemplated by the parties at the time the contract was entered into. The damage allowed in such cases must be something which could have been foreseen and reasonably expected and to which the defendant can be deemed to have assented, expressly or impliedly, by entering into the contract. *Borille, C. J., in British, etc., Co. v. Nettleship*, L. R. 3 C. P. 499; *Hadley v. Boxendale*, 9 Exch. 344; *Hopkins v. Sanford*, 38 Mich. 611. But in cases of tort the plaintiff does not assist in making the case; it is made for him against his will by a party who chooses his own time, place, and manner of committing the wrong, and if the nature of the case which he thus makes up is such that the elements of injury are uncertain and there is difficulty in arriving at the just measure of redress, the consequences should fall upon the wrong-doer. "To deny the injured party the right to recover any actual damages in such cases, because they are of a nature which cannot be certainly measured, would be to enable parties to profit by and speculate upon their own wrongs, encourage violence and invite depredation." *Gilbert v. Kennedy*, 22 Mich. 117, 130.

But where the damages are such as do not follow the injury, as a necessary consequence, they should be specially alleged in the declaration. This is a rule of fairness, that the defendant may know what case it is intended to make against him, and be prepared to meet it, if it is false or falsely colored. In the cases above cited from our own reports, the allegations of special damage were very full and specific. But in this case there is only a general allegation that the plaintiff was prevented from doing and performing his necessary business and looking after and attending his necessary affairs and avocations. This liability may well

be said to flow as a necessary consequence from any severe injury; and it was therefore held in *Tomlinson v. Derby*, 43 Conn. 562, that such an averment could only be construed as characterizing the injury and indicating its extent in a general way, and that it did not lay the foundation for proof of special damages in a particular employment. Evidence that plaintiff was engaged in a particular business, at which he was earning \$100 a month, was therefore excluded in that case, though the declaration was similar to the one here. *Taylor v. Monroe*, 43 Conn. 36, is to the same effect. *Wade v. Le Roy*, 20 How. 34, 15 L. Ed. 813, must be regarded as opposed to these. * * *

The general spirit of our decisions would perhaps lead to a more liberal rule than that applied in Connecticut as above shown, but would not, I think, support the ruling complained of here. What was the special injury complained of in the declaration? Only that the plaintiff, by reason of the battery, was greatly hindered and prevented from doing and performing his work and business, and looking after and attending his necessary affairs and avocations. Did this fairly apprise the defendant that the plaintiff would seek to show, not merely that he was disabled from pursuing a particular employment not mentioned, but also that, by reason of the inability to obtain laborers, his property went to ruin? If there is a natural and inseparable connection between the alleged injury and the damage, then the defendant should have been prepared to meet such a showing; otherwise he was entitled to more specific allegations. But there is no such natural and inseparable connection; the circumstances must be altogether exceptional which would cause a farmer to lose his crops because he could not personally gather them. Indeed, according to the plaintiff's showing, the circumstances were exceptional here; for the injury to the hay is attributed to the difficulty of obtaining help to save it. But the defendant, had he been apprised of the purpose to claim for such a damage, might perhaps have shown that the difficulty was wholly imaginary, or that the plaintiff wilfully suffered his hay to be injured, when he might have avoided it. It was his right to make such a showing, if the facts would warrant it. But he could not be aware of the necessity until he was notified that damage to the hay by reason of the battery was claimed. * * * The judgment, I think, should be reversed and a new trial ordered.

III. Province of Court and Jury⁸

BALTIMORE & O. R. CO. v. CARR.

(Court of Appeals of Maryland, 1889. 71 Md. 135, 17 Atl. 1052.)

ALVEY, C. J.⁹ This is an action on the case brought by the appellee against the appellant for the wrongful refusal of admission of the former to the cars of the latter. * * *

We think, however, there was error in the second instruction of the court, in respect to the question of damages. The jury were instructed that, if they found for the plaintiff for the refusal to pass him through the gate, then he was entitled to such damages as they might find would, under all the circumstances, compensate him for such refusal. This left the whole question of damages at large, without definition by the court, to the discretion of the jury, and without any criterion to guide them. What compensation would embrace—whether actual and necessary expenses incurred by reason of the refusal, or the mere delay, or disappointment in pleasure, or the possible loss in business transactions, however remote or indirect, or for wounded feelings—were matters thrown open to the jury, and they were allowed to speculate upon them without restraint. This is not justified by any well-established rules of law. In the case of *Knight v. Egerton*, 7 Exch. 407, where, in effect, such an instruction was given, the court of exchequer held it to be wholly insufficient, “and that it was the duty of the judge to inform the jury what was the true measure of damages on the issue, whether the point was taken or not;” and the court directed a new trial because of the indefinite instruction as to the true measure of damages. The rule by which damages are to be estimated is, as a general principle, a question of law to be decided by the court; that is to say, the court must decide and instruct the jury in respect to what elements, and within what limits, damages may be estimated in the particular action. *Harker v. Dement*, 9 Gill, 7, 52 Am. Dec. 670; *Hadley v. Baxendale*, 9 Exch. 341, 354.

The simple question whether damages have been sustained by the breach of duty or the violation of right, and the extent of damages sustained as the direct consequences of such breach of duty or violation of right, are matters within the province of the jury. But beyond this juries, as a general rule, are not allowed to intrude, as by such intrusion all certainty and fixedness of legal rule

⁸ For discussion of principles, see *Hale on Damages* (2d Ed.) §§ 96, 97.

⁹ Part of the opinion is omitted.

world be overthrown and destroyed. In a case like the present the rule for measuring the damages is fixed and determinate, and should be applied to all cases alike, except in those cases where there may be malice or circumstances of aggravation in the wrong complained of, for which the damages may be enhanced. Indeed, it is of the utmost importance that juries should be explicitly instructed as to the rules by which they are to be governed in estimating damages; for, as it was justly observed by the court in *Hadley v. Baxendale*, *supra*, "if the jury are left without definite rule to guide them, it will, in most cases, manifestly lead to the greatest injustice." In cases of this character the jury can only give such damages as were the immediate consequences naturally resulting from the act complained of, with the right to allow exemplary damages for any malice, or the use of unnecessary force, in the commission of the wrong alleged. *Railroad Co. v. Blocher*, *supra* [27 Md. 277].

The expenses incurred by the plaintiff, occasioned by the refusal of the defendant to admit him to the train, such as the expense of a ticket to travel upon another train, and hotel expenses incurred by reason of the delay, may be allowed for; and mere inconvenience may be ground for damage, if it is such as is capable of being stated in a tangible form, and assessed at a money value; and so for any actual loss sustained in matters of business that can be shown to have been occasioned as the direct and necessary consequence of the wrongful act of the defendant made the ground of action. *Denton v. Railway Co.*, 5 El. & Bl. 860; *Hamlin v. Railway Co.*, 1 Hurl. & N. 408; *Hobbs v. Railway Co.*, L. R. 10 Q. B. 111; *Wood's Mayne*, Dam. 398, 399; 2 Greenl. Ev. § 254. For the error in the second instruction of the court, with respect to the measure of damages, the judgment of the court below must be reversed, and a new trial awarded.

TATHWELL v. CITY OF CEDAR RAPIDS.

(Supreme Court of Iowa, 1903. 122 Iowa, 50. 97 N. W. 96.)

Action to recover damages resulting from personal injuries received by plaintiff while driving in a street of defendant city by reason of his horse stepping into a hole in the highway in or beside a culvert, the result being that plaintiff was thrown to the ground. Judgment for plaintiff on a former trial was reversed, and a new trial ordered. 114 Iowa, 180, 86 N. W. 291. On this trial verdict was returned for the plaintiff for \$100 damages, which, on plaintiff's motion, was set aside as inadequate. From this ruling defendant appeals.

McCLAIN, J.¹⁰ There was a conflict in the evidence as to whether the street was defective at the place where plaintiff was injured, but the verdict of the jury for the plaintiff establishes the existence of a defect and the negligence of the city with reference thereto, and we have for consideration only this question: Did the trial judge err in setting aside the verdict on the ground that the damages awarded to plaintiff for the injury were inadequate? The right of jury trial, as uniformly recognized under the common-law system, involves the determination by the jury, rather than by the judge, of questions of fact, including the amount of damage to be given where compensation is for an unliquidated demand. Nevertheless, the trial courts have exercised from early times in the history of the common law the power to supervise the action of the jury, even as to the measure of damages, and to award a new trial where the verdict is not supported by the evidence and is manifestly unjust and perverse. And while it is uniformly held that the trial judge will interfere with the verdict of the jury as to matters of fact with reluctance, and only where, on the very face of the evidence, allowing every presumption in favor of the correctness of the jury's action, it is apparent to a reasonable mind that the verdict is clearly contrary to the evidence, yet the power of the judge to interfere in extreme cases is unquestionable. It has sometimes been said that the judge should not interfere where the verdict is supported by a scintilla of evidence; but the scintilla doctrine has been discarded in this state, and is not now generally recognized elsewhere. *Meyer v. Houck*, 85 Iowa, 319, 52 N. W. 235.

The general scope and extent of the judge's supervisory power with reference to the jury's verdict as to questions of fact is well illustrated by the very first reported case in which the power appears to have been exercised—that of *Wood v. Gunston*, decided in 1655 by the Court of King's Bench (or, as it was called during the commonwealth, Upper Bench), found in *Style's Reports*, on page 466. The action was upon the case for speaking scandalous words against the plaintiff, charging him, among other things, with being a traitor. The jury gave plaintiff £1,500 damages, whereupon the defendant moved for a new trial on the ground that the damages were excessive, and that the jury had favored the plaintiff. In opposition to this it was said in argument that, after a verdict the partiality of the jury ought not to be questioned, nor was there any precedent for it "in our books of the law," and that it would be of dangerous consequence if it should be permitted, and the greatness of the damages cannot be a cause for a new trial. But counsel for the other party said that the verdict was a "packed business," else there could not have been so great damages, and

¹⁰ Part of the opinion is omitted.

that the court had power "in extraordinary cases such as this is to grant a new trial." The chief justice thereupon said: "It is in the discretion of the court in some cases to grant a new trial, but this must be a judicial, and not an arbitrary, discretion, and it is frequent in our books for the court to take notice of miscarriages of juries, and to grant new trials upon them. And it is for the people's benefit that it should be so, for a jury may sometimes, by indirect dealings, be moved to side with one party, and not to be indifferent betwixt them, but it cannot be so intended with the court; wherefore let there be a new trial the next term, and the defendant shall pay full costs, and judgment to be upon this verdict to stand for security to pay what shall be recovered upon the next verdict." This case is especially interesting in connection with the present discussion, because it is one in which the assessment of damages was peculiarly within the province of the jury, and because the nature of the supervisory power of the trial judge is explained as being, in effect, to set aside a verdict for excessive damages in such cases which seem to have been the result of passion and prejudice, and not the deliberate exercise of judgment. That the practice of granting new trials under such circumstances has continued in all the courts administering the common law from the time of the case just cited to the present time is a matter of common knowledge with the profession, and citation of authorities would be superfluous. That the power is exercised to prevent miscarriage of justice by reason of the rendition of a verdict by the jury which is wholly unreasonable, in view of the testimony, which is given in the presence of the court, is universally conceded.

But the question with which we are now more particularly concerned is whether this power of the trial judge may be exercised where the injustice consists in rendering a verdict for too small an amount. If the case is one in which the measure of damages is a question of law, the court has, of course, the same power to set aside a verdict for too small an amount as one which is excessive; and this is, in general, true without question where the damages are capable of exact computation—that is, where the facts established by the verdict of the jury show as matter of law how much the recovery should be. In such cases the court may grant a new trial, unless the defendant will consent to a verdict for a larger amount, fixed by the court, than that found by the jury; just as in case of excessive damages under similar circumstances the court may reduce the amount for which the verdict shall be allowed to stand, on penalty of setting it aside if the successful party does not agree to the reduction. *Carr v. Miner*, 42 Ill. 179; *James v. Morey*, 44 Ill. 352. It seems to have been thought by some courts that the general supervisory power over verdicts, where the amount of damage is not capable of computation, and rests in the sound discretion of the jury, should not be exercised where the verdict

is for too small an amount; at least not with the same freedom as in cases where it is excessive. *Barker v. Dixie*, 2 Strange, 1051; *Pritchard v. Hewitt*, 91 Mo. 547, 4 S. W. 437, 60 Am. Rep. 265; *Martin v. Atkinson*, 7 Ga. 228, 50 Am. Dec. 403. No such limitation on the supervisory power of the trial judge has been definitely established, and by the great weight of authority, both in England and America, the power to set aside the verdict, when manifestly inconsistent with the evidence, and the result of a misconception by the jury of their powers and duties, is as fully recognized where the verdict is inadequate as where it is excessive; and ample illustration of the exercise of this power is found in actions to recover damages for personal injuries or injury to the reputation, although in such cases the amount of damage is peculiarly within the jury's discretion. *Phillips v. London & S. W. R. Co.*, 5 Q. B. D. 781; *Robinson v. Town of Waupaca*, 77 Wis. 544, 66 N. W. 809; *Whitney v. Milwaukee*, 65 Wis. 409, 27 N. W. 39; *Caldwell v. Vicksburg, S. & P. R. Co.*, 41 La. Ann. 624, 6 South. 217; *Benton v. Collins*, 125 N. C. 83, 34 S. E. 242, 47 L. R. A. 33; *McNeil v. Lyons*, 20 R. I. 672, 40 Atl. 831; *Lee v. Publishers, George Knapp & Co.*, 137 Mo. 385, 38 S. W. 1107; *McDonald v. Walter*, 40 N. Y. 551; *Carter v. Wells, Fargo & Co. (C. C.)* 64 Fed. 1007.

Counsel for appellant urge, however, that the whole matter of granting new trials is controlled by the provisions relating to that subject found in the Code, and that these provisions supersede the common-law rules on the subject. It has not been our understanding that the provisions of the Code relating to practice are intended to entirely supersede the rules of the common law. They are, like other statutory law, merely additions to or modifications of common-law rules. We have held, for instance, that, without any statutory provision on the subject, the court may direct a verdict in a proper case; that new trials may be granted in equity after the expiration of one year from the time of rendering judgment, although the statutory provisions as to new trials after judgment limit the right to one year; that the Supreme Court may grant a restraining order, in the exercise of its general appellate jurisdiction, although there is no statutory provision whatever with reference thereto. These illustrations indicate that the provisions of the Code as to practice supersede common-law rules only so far as they are inconsistent therewith. The Legislature has never attempted a complete codification of the rules and principles of the common law, either as to substantive or remedial rights. * * *

However this may be, we think the authority is expressly given in Code, § 3755, to set aside a verdict which is manifestly inadequate under the evidence. * * *

Similar provisions in other Codes have been construed as authorizing the setting aside of verdicts on plaintiff's motion because the damages allowed are inadequate. *Du Brutz v. Jessup*,

54 Cal. 118; Bennett v. Hobro, 72 Cal. 178, 13 Pac. 473; Emmons v. Sheldon, 26 Wis. 648; Henderson v. St. Paul & D. R. Co., 52 Minn. 479, 55 N. W. 53; McDonald v. Walter, 40 N. Y. 551.

* * *

The trial judge therefore had the power to set aside the verdict below on account of the inadequacy of the damages, and the question is whether the case is a proper one for the exercise of such power. We interfere reluctantly with the action of the lower court in ruling on motions for a new trial, and especially where a new trial has been granted. Peebles v. Peebles, 77 Iowa, 11, 41 N. W. 387; Morgan v. Wagner, 79 Iowa, 174, 44 N. W. 345; Hopkins v. Knapp & Spaulding Co., 92 Iowa, 212, 60 N. W. 620; Mally v. Mally, 114 Iowa, 309, 86 N. W. 262; Chouquette v. Southern Electric R. Co., 152 Mo. 257, 53 S. W. 897. Although it is urged in this case that the jury allowed to the plaintiff the actual damages sustained by him so far as they are shown by any evidence corroborating his own testimony, nevertheless it clearly appears that, if his unimpeached testimony is to be credited, he was damaged to a much larger extent than is covered by the verdict rendered by the jury. We do not hold that the trial judge may substitute his judgment of the credibility of the witness in place of the judgment which the jury has exercised, but we do say that the trial judge may, if he finds that the jury have failed to allow the amount of damages shown by uncontradicted testimony, set aside the verdict as in conflict with the evidence and award a new trial. The ruling of the lower court was therefore correct, and it is affirmed.¹¹

¹¹ Setting aside verdict which is excessive, see Wright v. Beardsley, ante, p. 112, and Prince v. State Mutual Life Ins. Co., ante, p. 187.

BREACH OF CONTRACTS FOR SALE OF GOODS

I. Action by Seller—Damages for Nonacceptance¹

TODD v. GAMBLE.

(Court of Appeals of New York, 1896. 148 N. Y. 382, 42 N. E. 982,
52 L. R. A. 225.)

Action by Albert U. Todd and others against James Gamble and others. From a judgment of the general term (74 Hun, 569, 26 N. Y. Supp. 662) affirming a judgment for plaintiffs, defendants appeal.

GRAY, J.² This appeal presents the question of the proper measure of damages in an action against the defendants for refusing to perform their contract with the plaintiffs. By that contract the plaintiffs, who were manufacturers of chemicals, were to furnish the defendants with "whatever quantities of silicate of soda they will require to use in their factories during one year from date" at the price of \$1.10 per 100 pounds, in New York. Under this agreement the plaintiffs had delivered, and the defendants had paid for, 350 barrels of the article, when the latter notified the former that they would not receive any more. The refusal on the part of the defendants to perform their contract seems to have been purely arbitrary. Upon receiving this notice from the defendants, the plaintiffs ceased to manufacture under the contract. * * * It was conceded that for the balance of the contract year the defendants used about 2,877 barrels of silicate of soda (each barrel containing about 550 pounds), which they purchased from other parties; and under instructions from the court that the plaintiffs, if there was no market value for the article, were entitled to recover the difference between the cost of production and the contract price, the jury rendered a verdict for the plaintiffs against the defendants for their failure to take that amount, for damages measured by that rule. They also, upon the request of the court, made a special finding that at the time of the breach by the defendants of their contract there was no market value for silicate of soda.

The general rule for the measure of damages in the case of a breach by a vendee in the contract for the sale of an article of merchandise at a fixed price is the difference between the contract

¹ For discussion of principles, see Hale on Damages (2d Ed.) §§ 98-100.

² Part of the opinion is omitted.

price and the market value of the article on the day and at the place of delivery. *Gregory v. McDowel*, 8 Wend. 435; *Dey v. Dox*, 9 Wend. 129, 24 Am. Dec. 137; *Windmuller v. Pope*, 107 N. Y. 674, 14 N. E. 436; *Wood's Mayne*, Dam. § 200. That is the rule which has been recognized both in England and here. The principle upon which it rests is that of an indemnification of the injured party for the injury which he has sustained, and, in ordinary cases, the value in the market on the day forms the readiest and most direct method of ascertaining the measure of this indemnity. If the article is bought and sold in the market, the market price shows what pecuniary sum it would take to put the plaintiff in as good a position as if the contract had been performed. * * * To justify a departure from this general rule, the facts must take the case out of the ordinary, and, if there is no such standard as a market value, the measure of the plaintiff's damage may be arrived at, in a case like the present one, by ascertaining the difference between the contract price and the cost of production and delivery. Market value, in the ordinary sense, is generally, but not always, the measure of damages, and the application of the rule necessarily must be to a case where it is shown that there is a market value for the subject of the contract of sale. * * *

The defendants proceed upon the assumption that if an article is shown to have a value, or selling price, the measure of damages must be the difference between it and the contract price, irrespective of the question of the nature of the market for it. To use their language: "If there be no market, in a restricted sense, yet, if the commodity is the subject of sale, and there is a selling price, the same rule obtains, and proof of cost should be excluded." Proceeding upon that assumption, they argue, substantially, that as there was shown to be a selling price, from the fact of there having been sales of the article by the plaintiffs, it is a controlling factor, and compels the application of the general rule for which they contend. To that proposition I think we should not assent, and I fail to find adequate support for it either in principle or in the authorities. The general rule certainly can have no application to the case of a breach of a contract for the manufacture and sale of a commodity, unless it is made to appear that upon the breach by the vendee the vendor could have placed the commodity upon the market, and, by thus disposing of it, have relieved himself from the consequences of the defendants' default. The principle of indemnity upon which the rule rests would be satisfied in such a case, and the vendor would be confined for his recovery to the difference between a known market value at the time of the breach of the contract and the price fixed by the contract. In *Hadley v. Baxendale*, 9 Exch. 341, this rule was laid down by Baron Alderson: "Where two parties have made a contract, which one

of them has broken, the damages which the other party ought to receive, in respect of such breach of contract, should be such as may fairly and reasonably be considered either arising naturally—i. e. according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.”

What must the parties be deemed to have contemplated in the present case? The defendants bound the plaintiffs, through this contract, to supply all the silicate of soda which they would require for the year. The plaintiffs, with ample capacity for supplying the article, contemplated that their production would be increased by the amount which the defendants would take from them during the year. The defendants agreed to take the article only from the plaintiffs, and were accorded a concession upon the price at which the plaintiffs were then selling their product. The plaintiffs were assured of sales which, with their facilities for manufacturing, would represent to them a profit measured by the difference between the cost of its production and the price which they had fixed in the contract. The defendants well knew, from the perishable nature of the article and its limited demand, that the plaintiffs would manufacture to meet their requirements in their business and that such an article would not be manufactured in such large quantities as would be needed by them, unless it could be disposed of at once. Of course, they must have contemplated a profit to the plaintiffs if they could manufacture at a cost under the contract price. It is absurd to say, in view of the evidence, that there was a market value, in the ordinary sense of the term, for silicate of soda, and, perhaps, the defendants do not seriously argue that there was. But if we are to hold, in accordance with their views, because there was a price at which the plaintiffs had been able to effect sales of the article at the time of the breach, that that fact must be controlling in fixing the measure of damages, we should be doing a great injustice, and we should be establishing a commercial rule, which would work injuriously in cases where, like the present one, the subject of sale between the parties is an article perishable in its nature, when kept for any length of time, having but a limited demand, and no real market, and only manufactured in any quantities upon orders by consumers. * * *

We have ample authority for saying that, as silicate of soda was an article which had no market value, in the ordinary sense, but was usually manufactured upon orders given by consumers, the manufacturer, whose contract to furnish it is broken by the refusal of the vendee to take it, is entitled to recover as his damages the profits which the performance of the contract by the vendee would have produced to him, or the difference between what

it would have cost him to manufacture and deliver it under the contract and the price agreed to be paid therein by the vendee.
* * * Judgment affirmed.

II. Action by Buyer—Damages for Nondelivery³

RIGHTER v. CLARK.

(Supreme Court of Errors of Connecticut, 1905. 78 Conn. 9, 60 Atl. 741.
112 Am. St. Rep. 84.)

Action by Walter L. Righter and Wilbur A. Marshall against George B. Clark. From an order setting aside the verdict in favor of defendant for \$439.20 on a counterclaim, defendant appeals.

BALDWIN, J.⁴ The plaintiffs, wholesale coal dealers in New York City, sued the defendant, a coal dealer in Derby, for a balance of \$500 due for coal sold to him. His answer, admitting the indebtedness, set up by way of counterclaim that they owed him \$1,000 as damages for breach of a contract made with him in New York City on February 6, 1903, to sell and deliver to him at Derby a cargo of coal then laden on the barge President, in New York Harbor. The damages which he alleged that he had suffered were the loss of profits that he would have made by retailing the coal to customers in Derby who needed and would have bought it, as the plaintiffs well knew, and of the trade of a large number of customers, and of freight paid, at a higher rate than that agreed on with the plaintiffs, on coal which he was obliged to purchase from others, and a depreciation in value of such coal before he could sell it. It was admitted by the pleadings that the cargo in question, consisting of 499 tons, was so sold to him at \$5.25 a ton, free on board, at New York, and that the defendant was to pay 90 cents a ton for its transportation on the barge to Derby. The plaintiffs denied that they were to deliver it in Derby, claiming that it was to be taken there by the defendant, he arranging for the transportation with the master of the barge, and paying the freight to him; and as to this the evidence was sufficient to justify the jury in finding the issue for the defendant. They could therefore award him such damages as naturally followed from the plaintiffs' failure to deliver the coal at Derby as agreed; that is, within a reasonable time after February 6th. Their ordinary measure would be the excess, if any, of the market price of such coal at Derby at

³ For discussion of principles, see Hale on Damages (2d Ed.) §§ 102, 103.

⁴ Part of the opinion is omitted.

the date when the cargo should have been delivered, and the price agreed on between the parties. *Jordan, Marsh & Co. v. Patterson*, 67 Conn. 473, 480, 35 Atl. 521. This market price would be the wholesale price. It was not claimed that there was any wholesale market price for coal at Derby. The value of coal at Derby would therefore be determined by its wholesale market price at the time at the nearest convenient wholesale market, and the cost of transportation from there to Derby. *Grand Tower Co. v. Phillips*, 23 Wall. 471, 480, 23 L. Ed. 71. A near and convenient wholesale market was to be found in New York City.

The evidence showed beyond reasonable question that coal of the kind in question, which had previously been scarce there, on account of the great strike in Pennsylvania, became plenty early in February, and that the wholesale market price did not rise after February 6th during the remainder of that month and the month following. It showed, also, * * * that the freight on coal by the car load from Bridgeport to Derby in February was 80 cents a ton. The defendant could therefore have bought other and equally good coal, at and for a considerable time after the breach of contract by the plaintiffs, at the same price which he agreed to pay to them, except for such increase as there might be in the freight charges between New York and Derby. It appeared that he bought a cargo from them on February 13th, for transporting which to Derby by way of the Housatonic river he paid \$1 a ton. This did not reach Derby until March, but, had it been shipped to Bridgeport, and thence to Derby by rail, the freight would not have exceeded \$1.80 a ton. If he could properly have taken the latter course, his damages from the breach of contract would be 90 cents a ton, or less than \$450. The verdict, in effect, gave him \$939.20. That the plaintiffs knew when they sold him the cargo, that he bought for the purpose of selling it at retail did not entail any obligation to answer for profits which he might have made, had he been able so to sell it. The coal could easily have been replaced by purchases from others, with the same opportunity for profit on resales.

No proof was offered of the alleged loss of customers, nor of a shrinkage in value of coal bought from others to replace that sold by the plaintiffs; and, had there been, it would have been inadmissible. Such consequences were not of a kind to be reasonably anticipated from the breach of the plaintiffs' contract. * * *

It is further contended that, if the verdict was excessive, it should have been set aside only in case the plaintiff declined to remit a portion of the damages. There is nothing in the evidence that could justify the jury in finding damages in excess of the \$500 which was conceded to be due to the plaintiffs. The verdict should have been in their favor. There is no error.

III. Same—Damages for Breach of Warranty ⁵

PARK v. RICHARDSON-BOYNTON FURNACE CO.

(Supreme Court of Wisconsin, 1895. 91 Wis. 189, 64 N. W. 859.)

Action by B. B. Park and others against the Richardson-Boynton Furnace Company. The plaintiffs bought of the defendant a furnace for heating their building. The furnace was warranted to work satisfactorily. It did not work satisfactorily. The plaintiffs brought this action to recover damages for the breach of the warranty. There was a jury trial, resulting in verdict and judgment for the plaintiffs, from which the defendant appeals. Error is alleged in the charge of the court as to the measure of damages. The court instructed the jury that, in case they found for the plaintiffs, "the plaintiffs will be entitled to recover the difference between the purchase price of the furnace * * * and its actual value."

NEWMAN, J. When this case was here before (81 Wis. 399, 51 N. W. 572), it was said that the proper rule of damages for breach of the warranty of the furnace would be "the difference between its actual value and its value had it conformed with the warranty." This is undoubtedly the true rule. *Suth. Dam.* (2d Ed.) § 670; *Morse v. Hutchins*, 102 Mass. 440. The rule stated by the trial court is not the equivalent of the true rule. The rule of the trial court deprives the purchaser of the profit of his bargain, if he has made a good one, and gives him an undue advantage, if he has made a bad one. The furnace may have been either cheap or dear, at the price paid, even if it had conformed to the warranty. If it was a bad bargain, aside from the defects complained of, the plaintiffs' damages are less than if it had been a good bargain. This consideration is an element in the rule of damages. The question of the value of the furnace, if it had conformed to the warranty, should have been left to the jury, as well as the question of its actual value. The defendant may have suffered by the error. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

⁵ For discussion of principles, see *Hale on Damages* (2d Ed.) § 105.

DAMAGES IN ACTIONS AGAINST CARRIERS

I. Carriers of Goods—Damages for Loss or Nondelivery¹

BLACKMER v. CLEVELAND, C., C. & ST. L. RY. CO.

(Court of Appeals of Missouri, 1903. 101 Mo. App. 557, 73 S. W. 913.)

Action by C. E. Blackmer and others against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment in favor of plaintiffs, defendant appeals.

GOODE, J.² The petition in this case is in six counts, each of which charges the defendant with converting to its own use certain car loads of coal which belonged to the plaintiffs, and had been put aboard cars on defendant's tracks at Hillsboro, Ill., by the Hillsboro Coal Company, consigned and to be carried by the defendant to the plaintiffs. * * *

On December 18, 1901, the defendant notified the Hillsboro Coal Company that none of defendant's own cars set out on the side track at Hillsboro should be loaded with coal for any other customer than the defendant itself. This notification, as well as the appropriation of plaintiffs' coal, was induced by the urgent need of the railroad company for coal to operate its trains at that time, as there was a car famine so that coal could not readily be obtained from the different mines on defendant's lines and elsewhere. Prior to said notification the defendant had permitted its own cars to be loaded with coal to be carried to any consignee, and when the notification was given the Hillsboro Coal Company did not assent to the requirement that all coal loaded on the cars should be for the use of the railroad company; in fact, did not make any response to the notice. The Hillsboro Coal Company could not have agreed to the proposition of the railroad company, because it was under a contract with the plaintiffs to furnish them constantly a certain proportion of the output of its mines, while plaintiffs were under contracts, as stated, with various consumers in the city of St. Louis, to furnish them so much coal daily to run their factories, and relied on getting their supply from Hillsboro. Coal cars were set out on its side tracks at Hillsboro by the defendant on the 18th, 19th, and 20th of December, and were loaded as usual by the Hillsboro Company for plaintiffs, and the agent of the de-

¹ For discussion of principles, see Hale on Damages (2d Ed.) § 108.

² Part of the opinion is omitted.

fendant company instructed by telephone, as had been the custom, to bill the coal to the plaintiffs at East St. Louis. Instead of doing so he marked on the bill of lading that the coal was for the company's use. The Hillsboro people were powerless to prevent this action, although their employé who attended to the matter testified positively that he never consented for the coal to be taken by the railroad company. * * *

We do not accede to the contention that the measure of damages was the value of the coal at Hillsboro, instead of at East St. Louis. Some cases so hold, but the law in this state, and we think in most jurisdictions, is that the true measure of damages in cases like this is the value of the goods at their destination. *Farwell v. Price*, 30 Mo. 587; *Rice v. Railroad*, 3 Mo. App. 27. It is palpable that plaintiffs' loss was what they could have sold the coal for at St. Louis, less the cost of transportation, if they had to pay that expense. Their damages, therefore, could not be measured by the value of the coal at Hillsboro without doing them an injustice.

We think, too, this was a case for punitive damages. The defendant's urgency may have been great, but so was the plaintiffs'. If the defendant had to have coal to run its trains, plaintiffs likewise had to have coal to supply their customers in fulfillment of plaintiffs' contracts, and so that the customers could run their factories; and an emergency such as the defendant may have found itself in affords no excuse for appropriating the property of another. The evidence does not show that the defendant was bound to use this coal or stop running its trains; and if that was shown it would be no justification for forcing plaintiffs and others into a like dire strait, though it might excuse the defendant from punitive damages. We see no good reason why, in an action for the conversion of property accompanied by circumstances of lawlessness and oppression, punitive damages should not be awarded as much as for wanton trespass to property, and it has been ruled that exemplary damages may be given in such cases. *Carson v. Smith*, 133 Mo. 606, 34 S. W. 855; *Reamer v. Express Co.*, 93 Mo. App. 501, 67 S. W. 718; *Downing v. Outerbridge*, 25 C. C. A. 244, 79 Fed. 931.

Defendant makes the point that the instruction in regard to the measure of damages is erroneous, in that it does not direct a deduction from the value of the coal at East St. Louis of the cost of the transportation to that point; that is, of the freight charges. The measure of damages for the conversion of property by a carrier during shipment is its value at destination, less the cost of transportation, if the consignee or owner has to pay said cost. But the uncontradicted testimony of the manager of the Hillsboro Cool Company is that once a month the latter company paid the freight on all coal shipped to the plaintiffs, doubtless pursuant to

some arrangement between plaintiffs and it. If plaintiffs bought the coal to be shipped at the expense of the coal company, their recovery ought not to be reduced by the freight charges. The judgment is affirmed.

II. Same—Damages for Delay³

DAVIDSON DEVELOPMENT CO. v. SOUTHERN RY. CO.

(Supreme Court of North Carolina, 1908. 147 N. C. 503, 61 S. E. 381.)

Action by the Davidson Development Company against the Southern Railway Company. By testimony offered on the part of plaintiff and admissions of defendant company it was made to appear that in compliance with an order from plaintiff, John T. Watson, on June 28, 1906, delivered to the defendant at Danville, Va., two car loads of brick, taking therefor a bill of lading, to his order "notify W. H. Phillips, Lexington, N. C.," who was secretary and treasurer of plaintiff company. Said Watson drew a draft for \$110.25, the price of the brick, on the plaintiff company, and attached thereto the bill of lading, and forwarded the same through the banks to Lexington. On June 29th or 30th W. H. Phillips, as secretary and treasurer of the plaintiff company, paid the draft and received the bill of lading. On June 29th, and while the cars were still in the yard of the defendant at Danville, Va., Watson requested the defendant to divert the cars to another customer of his. In pursuance of this request the defendant diverted the shipment, taking from said Watson a bond to indemnify defendant for any loss or damage by reason of said diversion, and in consequence thereof the plaintiff did not receive them, and it was three weeks later before the brick could be replaced. The plaintiff was constructing at Lexington a three-story brick building, and the brick were ordered to be used in that building. The plaintiff was unable to get the desired kind of brick elsewhere, and was delayed in the completion of its building for three weeks, this being the wrong complained of. Prior to the time in question the plaintiff had the building rented to responsible persons to the amount or sum of over \$250 per month, said rent to begin upon completion of the building. At the time of the delay the plaintiff had invested \$20,000; the lot being worth \$5,000, and the building as it then stood \$15,000. This money was idle for the period of delay, and the plaintiff was paying interest upon it.

³ For discussion of principles, see Hale on Damages (2d Ed.) §§ 110, 111.

There was no evidence other than that afforded by the order itself that the defendant at the time of the delivery to it by Watson of the brick knew for what they were to be used, nor did the defendant have any information or knowledge that the plaintiff was constructing any building or had any capital invested, or would in any way suffer any special damages. The court held that on the facts: (1) The defendant was liable; (2) that the correct amount of damage was the rental value of the building for the three weeks' wrongful delay, to wit, three-fourths of \$250, or \$187.50. Defendant excepted to both rulings. Verdict and judgment for \$187.50, and defendant appealed.

HOKE, J.* There is no question of the position insisted on by defendant that the consignor of goods who has shipped them to his own order may divert them from their original destination, and as a general rule this is not changed by the fact that they are shipped with directions to notify a given person, the proposed vendee. Under such an arrangement, without more, the goods remain the property of the original owner, and he has the right to dispose of them as he desires. This right, however, as between the parties, does not exist when the carrier has given a bill of lading for the goods, which has been indorsed and forwarded, with draft attached, to the proposed vendee, and such vendee has paid the draft and taken over the bill of lading, without notice, and before the goods would have reached their original destination in the ordinary course of shipment. * * *

We are of opinion, however, that there was error on the part of the court as to the amount of damages which plaintiff is entitled to recover, on the facts as they are now presented. Damages of the kind claimed in this action, i. e., consequential damages, are only recoverable when they are the natural and probable consequence of the carrier's default. Hale on Damages, 256. And ordinarily such damages are only considered natural and probable when they may be reasonably supposed to have been in contemplation of the parties at the time the contract was made. Wood's Mayne on Damages, 18; Neal v. Hardware Co., 122 N. C. 104, 29 S. E. 96, 65 Am. St. Rep. 697. It may be, as suggested in Tillinghast-Styles Co. v. Cotton Mills, 143 N. C. 274, 55 S. E. 621, that, if the contract is still in the course of performance, as in continuing contracts of carriage, that knowledge brought home to the parties during the continuance of the contract relation, and in time to have prevented or reduced the damages, might affect the result. But such a modification of the general rule is not called for here, as the amount of damage would be the same in either event. And for wrongful delay in the shipment of goods having a market value,

* Part of the opinion is omitted.

the damages usually supposed to be in contemplation, is the difference in the value of the goods at the time when they should have been and were delivered. In other cases the value of the user of the goods may be recovered if they are in condition to use, and in the absence of any appreciable loss from either source the interest on the money invested in the goods themselves for the time of the wrongful delay would be the correct measure of compensation. This being the amount recoverable under the general rule, if plaintiff seeks to recover other and additional damages by reason of special circumstances, a knowledge of these circumstances should be brought home to the other party. As we have said in *Tillinghast-Styles Co. v. Cotton Mills*, 143 N. C. 272, 55 S. E. 622: "If the plaintiff seeks to recover different and additional damages arising by reason of special circumstances, he is required to show that defendant had knowledge of these circumstances, and of a kind from which it could be fairly and reasonably inferred that the parties contemplated that they should be considered as affecting the question of damages." Instructive cases showing the application of this principle will be found in *Mather v. Express Co.*, 138 Mass. 55, 52 Am. Rep. 258; *Railway v. Ragsdale*, 46 Miss. 458; *Horne v. Railroad*, L. R. C. P. 71-72, 583.

In this case at bar there are no facts or circumstances shown which would entitle plaintiff to a greater amount of damages than the interest on the value of the two car loads of brick for the time of the wrongful delay. There was no evidence offered that defendant company was aware that the brick were to be used in a building of any special size or kind, or a wrongful diversion would work the delay which resulted. So far as it reasonably appeared to defendant, the brick were ordered for the trade, and in the absence of any testimony as to change in the value of the brick the interest on the amount invested in the shipment for the three weeks, as heretofore stated, is the measure of plaintiff's loss for which defendant can be held responsible. In the cases chiefly relied on by plaintiff, *Neal v. Hardware Co.*, 122 N. C. 104, 29 S. E. 96, 65 Am. St. Rep. 697, and *Rocky Mount Mills v. Railroad Co.*, 119 N. C. 693, 25 S. E. 854, 56 Am. St. Rep. 682, the character of the shipments were held to be evidence of notice of special circumstances, tending to make the damage claimed in those cases the natural and probable result of the wrongful delay on the part of the carrier. There is error to defendant's prejudice, and a new trial is awarded.

III. Carriers of Passengers—Wrongful Ejection ⁵

YORTON v. MILWAUKEE, L. S. & W. R. CO.

(Supreme Court of Wisconsin, 1884. 62 Wis. 367, 21 N. W. 516, 23 N. W. 401.)

Yorton, the plaintiff, purchased a ticket from Marion to Oshkosh over defendant's road. He delivered his ticket to one Sherman, the conductor of defendant's train, asking for a stop-over check at Clintonville. The conductor by mistake gave him a trip check instead, and when, after a stop-over, plaintiff got on a second train at Clintonville to complete his journey to Oshkosh, Bartlett, the second conductor, refused to accept the check for further passage, under the rules of the company. Plaintiff refused to pay fare to his destination amounting to \$1.85, and under orders of the conductor left the train. By reason of exposure plaintiff became ill.⁶

COLE, C. J. The sole question in this case is, was the rule of damages which was laid down by the learned county court correct in view of the facts disclosed on the trial? That rule was, in effect, that the plaintiff was only entitled to recover the additional fare he had to pay to get from Clintonville to Oshkosh, with interest. When the case was here on a former appeal (54 Wis. 234, 11 N. W. 482, 41 Am. Rep. 23) we thought the charge of the court as to the rule of damages incorrect, because it went upon the hypothesis that the plaintiff was unlawfully put off the train at the Bear Creek station. We held that the plaintiff was not entitled to ride on the second train upon the trip check which he had received from the conductor of the first train, and that, under the rules of the company, the second conductor might demand the additional fare to his place of destination, and, upon the plaintiff's refusal to pay, might eject him from the train at some usual stopping-place, using no unnecessary force for the purpose. We said the second conductor had the lawful right to do this, and was bound to do it, in obedience to a reasonable rule of the company which required a passenger to obtain from his conductor a stop-over check when he desired to stop before reaching the place to which he had purchased his ticket; and the mistake or fault of the first conductor in not giving him, on request, such a check, would not give him the lawful right to ride on the second train, though he might recover damages against the company for the wrongful act of the first conductor.

The court below strictly adhered to this decision, and charged that the plaintiff was rightfully put off the train at the Bear Creek

⁵ For discussion of principles, see Hale on Damages (2d Ed.) § 117.

⁶ The statement of facts is rewritten.

station by the second conductor. And the learned county court seemed to suppose it legally and logically resulted from that view that the plaintiff was confined in his recovery to the additional fare he had been compelled to pay, and interest thereon; but we do not think that conclusion correct when the other undisputed facts of the case are considered. The jury, in effect, found, in answer to the question submitted, that the plaintiff purchased a ticket for Oshkosh, which, of course, entitled him to passage to that place. Further, that Conductor Sherman, when he took up this ticket, was informed by the plaintiff that he wished to stop over at Clintonville, and requested the conductor to give him a stop-over check. Thereupon Conductor Sherman gave the plaintiff, doubtless through mistake, a trip check as and for a lay-over check. The plaintiff received this check believing it to be a stop-over check. When he entered upon the second train at Clintonville, the next morning, he had every reason to suppose that he had the proper voucher for a passage on that train to Oshkosh. But after the train started from Clintonville he was told by the second conductor, when his ticket was called for, that he could not ride on his train on the check which he had received from the first conductor, and that he must either pay his fare to Oshkosh or leave the train. He refused to pay his fare, and proceeded on his journey, but concluded to obey the order of the conductor and leave the train at Bear Creek.

The question then is, had not the plaintiff the right to adopt this course—leave the train as he was ordered to do, and hold the company responsible for the fault or mistake of the first conductor? We are clearly of the opinion that he had. And, choosing that alternative, what damages would he be entitled to recover? It seems to us he could recover all such damages as were the direct and natural result of the wrongful act complained of. It is not entirely clear from the complaint whether the action is for a breach of contract, or for a violation of duty as common carrier, though we assume that it is of the latter character. But it can make no essential difference as to the rule of damages upon the facts proven. Whatever damages the plaintiff can show he sustained, which were the direct and natural consequence of the injurious act of Conductor Sherman, these the plaintiff may recover.

The learned counsel for the defendant says that the only natural and legitimate result of that act was to compel the plaintiff to again pay his fare from Clintonville to Oshkosh. This might have been the only loss the plaintiff sustained from the mistake of Conductor Sherman had he seen fit to pay his fare. But he did not do this, and exercised the option which the law gave him, of leaving the train and looking to the company for redress. The same counsel further says the plaintiff might have protected himself from all loss or inconvenience arising from the fault or mistake of

the first conductor at a trifling expense, and that he failed in a social duty by omitting to do so. The jury found that he had sufficient money with him when on the second train to have paid his fare from Clintonville to Oshkosh. But was he under any legal obligation to pay the additional fare exacted? He had once paid for a ticket to Oshkosh, and claimed the right to ride to his destination. Probably most persons having the ability would, under like circumstances, pay the additional fare rather than submit to the inconvenience and delay of leaving the train at that hour and place. But, as we have said before, we think the plaintiff had the option either to pay or leave the train and resort to his legal remedy. There are men who, in social life and business matters, act upon the maxim, "Millions for defense, but not a cent for tribute;" in other words, men who stand upon their strict legal rights. There is certainly a class of cases where the law imposes upon a party injured by another's breach of contract or tort the duty of making reasonable exertions to render the injury as light as possible.

Counsel have referred to authorities which affirm that rule of law. They have also cited cases which hold that a passenger cannot insist upon remaining on the train without paying fare, in order that force shall be used for his expulsion and then claim damages for the force thus used. But we have not been referred to a case analogous to this which decides that it was the duty of the plaintiff to have paid the fare exacted and remain on the train, in order to protect the company against the consequences of the mistake or fault of the first conductor. According to our view, the law imposed upon him no such duty. On the contrary, when he was ordered to leave the train or pay the additional fare, he had an election to leave, or remain on the condition of paying. Having concluded to leave, he has his remedy against the company for his damages, which are not necessarily limited to the additional fare paid subsequently to go to Oshkosh, and interest thereon. The law allows him to recover full compensation for the damages he sustained by reason of the fault of the first conductor. We feel it but just to observe that the conduct of Bartlett, the second conductor, was most considerate, fair, and honorable. For while insisting that the plaintiff must pay his fare to Oshkosh or leave the train, he, at the same time, told the plaintiff that if he did pay, on the arrival of the train at Oshkosh he would go with him to Conductor Sherman's house, which was only a short distance from the depot, and if Sherman said plaintiff was entitled to passage to Oshkosh he would refund the money exacted. Thus Mr. Bartlett proposed doing all in his power to make the matter right, while he enforced the rules of his company. His conduct in that behalf, certainly deserves commendation.

When this case was here on the first appeal, enhanced damages were claimed because the plaintiff was compelled to leave the train at the Bear Creek station in the night, and was exposed to the chilly air, took cold, became sick, etc. It appeared, then, from the plaintiff's own testimony, that before the train left Clintonville the second conductor demanded fare of him and told him he could not ride on the trip check which he held, and that the plaintiff had ample opportunity to leave the train at Clintonville. It was in view of this testimony, and of the plaintiff's refusal either to leave the train or pay his fare, that the remark was made that plaintiff should not recover for any exposure or sickness which he had brought upon himself by his own foolish and perverse conduct, he having been rightfully put off the train at Bear Creek. On the last trial the jury found that the plaintiff was not notified by Bartlett he could not ride on his train on the trip check before the train started from Clintonville. This fact was deemed material as bearing on the damages which the plaintiff should recover by reason of the exposure at Bear Creek.

There are many cases cited on the brief of counsel on both sides to sustain their respective positions. While we have examined them, we do not deem it necessary to comment on them here. They are all distinguishable from the case before us. The judgment of the county court is reversed, and the cause is remanded for a new trial.

LITTLE ROCK RY. & ELECTRIC CO. v. DOBBINS.

(Supreme Court of Arkansas, 1906. 78 Ark. 553, 95 S. W. 788.)

Action by D. F. Dobbins against the Little Rock Railway & Electric Company to recover damages for the wrongful ejection of plaintiff from a street car operated by defendant company. There was a verdict for plaintiff for \$500 compensatory damages and \$250 exemplary damages, and from the judgment entered thereon defendant appeals.

Wood, J.⁷ * * * The court gave, at the instance of appellee, the following instruction: "(6) The court instructs the jury that, if you find for the plaintiff on the first or second paragraph of his complaint, or on both, you should assess his damages at such sum as you believe from the evidence would be a fair pecuniary compensation to him for the inconvenience, injured feelings, indignity, and humiliation suffered by him, if any, by reason of his being expelled, under the circumstances he was, from defendant's car; and, in addition to that, if you believe from the evidence that the act of defendant's conductor in expelling or causing plaintiff to be ex-

⁷ Part of the opinion is omitted and the statement of facts is rewritten.

pelled from said car was malicious and oppressive, then you may add such sum you may think proper, under the circumstances, by way of punitive or exemplary damages as a punishment for the wrongful conduct of defendant's conductor." The court refused to give instructions 14 and 15, asked by defendant. They are as follows: "(14) You are instructed that the plaintiff is not entitled to recover exemplary damages in this case. (15) A street railway company is not liable in exemplary damages for the wrongful act of its employes in ejecting a passenger from its car, in the absence of proof of want of care in the selection of such employes and of authority given it for the commission of the act, or ratification thereof after its commission."

In *Foster v. Pitts*, 63 Ark. 387, 38 S. W. 1114, this court had under consideration the question of whether or not an individual was liable, in punitive damages, for the malicious acts of his agent, in the scope of the agent's authority, and the court said: "When an agent of an individual acts maliciously, he is presumed to act without authority, and, while the agent is liable, the principal is not, for punitive damages, unless it appear that he aided, adopted, or ratified the malicious act of the agent with a full knowledge of the facts." We cited, to support that doctrine, the case of *Lakeshore Ry. Co. v. Prentice*, 147 U. S. 104, 13 Sup. Ct. 261, 37 L. Ed. 97, where it is said: "Exemplary or punitive damages being awarded not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though, of course, liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent on the part of the agent. The rule has the same application to corporations as to individuals. This court has often, in cases of this class, as well as in other cases, affirmed the doctrine that for acts done by the agents of corporations, in the course of its business, and of their employment, the corporation is responsible, in the same manner and to the same extent, as an individual is responsible under similar circumstances."

Counsel for appellant rely upon these cases to support their contention that exemplary damages could not be awarded in this case, and that the court erred in giving the instruction for appellee and in refusing the prayers of appellant, *supra*. But the above cases are not applicable here. The Supreme Court of the United States makes no distinction between individuals and public carriers of passengers, in holding that such corporations, like an individual, cannot be held liable in exemplary damages for the malicious acts of its agents which it had not authorized or ratified. *Railway v.*

Prentice, *supra*. This court, while enforcing the above rule as to individuals (*Foster v. Pitts*, *supra*), has applied a different rule in the case of railroad corporations. Such corporations are liable in punitive damages for the willful, wanton, and malicious conduct of their agents and servants in the line of their duties. *Citizens' Street Ry. v. Steen*, 42 Ark. 321; *Railway v. Hall*, 53 Ark. 10, 13 S. W. 138; *Railway v. Davis*, 56 Ark. 51, 19 S. W. 107; *Fordyce v. Nix*, 58 Ark. 136, 23 S. W. 967; *Railway v. Power*, 67 Ark. 142, 53 S. W. 572; *Railway v. Wilson*, 70 Ark. 136-144, 66 S. W. 661, 91 Am. St. Rep. 74.

This rule as to carriers of passengers is grounded on public policy. Chief Justice Wood, in the case of *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 803, 22 South. 53, declares the rule and the reason therefor as follows: "It is argued that vindictive damages are in their nature penal, and that no one should be liable to punishment unless the act complained of is his own act, made so by his authorization or ratification of it when committed by the servant, and that it is illogical for the courts to do anything punitive in character, unless the master is directly and personally responsible for the very act complained of. The sufficient answer to this contention is that the judge-made law of punitive damages is not the result of logic, but of public necessity, as text-writers and courts have repeatedly shown. If corporations, artificial beings who can act only through agents and servants in their varied and multitudinous and constantly recurring business dealings with the public, can never be held liable in punitive damages for the acts of their servants unless expressly ratified by them, no matter how gross and outrageous the wrongful act of the servant, we feel perfectly safe in declaring that no recovery for more than mere compensatory damages will ever again be awarded against corporations. Corporations never expressly authorize their servants to beat or insult or outrage those having business relations with them, and they rarely ratify such conduct. Having, by the constitution of their being, to act solely by agents or servants, they must, as matter of sound public policy, be held liable for all the acts of their agents and servants who commit wrongs while performing the master's business and in the scope of their employment, and this to the extent of liability for punitive damages in proper cases."

This doctrine, although apparently in conflict with the decision of the Supreme Court of the United States, is supported by the majority of the states that have announced a rule upon the subject, and is in accord with our own views as announced in several cases *supra*. In addition to these cases, and the authorities cited in them, see *Joyce on Dam.* vol. 1, § 139 et seq.; *Watson on Dam. & Personal Inj.* § 730, and numerous authorities cited in notes. See, also, 2 *Red. on Rys.* § 203, note 1; *Hutch. on Car.* § 815; 2 *Wood R. R. (Minor's Ed.)* pp. 1416, 1417. Accepting appellee's ver-

sion of the manner of his expulsion from the car by appellant's conductor, which the jury has done, the evidence was sufficient to warrant a verdict for punitive damages. * * *

The court properly instructed the jury upon the subjects of compensatory and punitive damages, and the jury were warranted in finding that the conduct of appellant's conductor in the line of his duty was willful, wanton, and malicious. Therefore, we will not disturb the verdict. Nor can we say, in view of the duty of street car companies to protect its passengers from insult and injury, especially at the hands of its employés, that the verdict was excessive. * * * Judgment affirmed.⁸

⁸ For other cases discussing the liability of corporations for exemplary damages, see *Goddard v. Grand Trunk Railway*, ante, p. 190, and, contra, *Lake Shore & M. S. Ry. v. Prentice*, ante, p. 194.

DAMAGES IN ACTIONS AGAINST TELEGRAPH COMPANIES

I. Compensatory Damages—Proximate and Certain Damages ¹

HERRON v. WESTERN UNION TEL. CO.

(Supreme Court of Iowa, 1894. 90 Iowa, 129, 57 N. W. 696.)

Action to recover for damages alleged to have been caused by the negligence of defendant in not delivering in due time a telegraphic message. There was a trial by jury, and a verdict and judgment for plaintiff. The defendant appeals.

ROBINSON, J.² On the 31st day of March, 1890, the plaintiff was the owner of a stallion named "Mark," which was in the custody of his brother George Herron, at Warren, in Lee county. * * * On that date one George Cassidy went to the place where the horse was kept, and made an offer for him to a brother of plaintiff, named B. B. Herron, and requested that he telegraph the offer to the plaintiff. Accordingly B. B. Herron went to the office of the defendant in Warren, and left to be sent to plaintiff a night message which read as follows: "Warren, March 31, 1890. To C. C. Herron, Clarksville, Iowa: Have traded with George Cassidy for Mark, three horses, 1, 2, 3, two hundred balance, fifty dollars young cattle. B. B. Herron." There was evidence which tended to show that the offer of Cassidy was to be considered withdrawn on Wednesday, April 2d, if not accepted on or before that day. * * * The dispatch was received by the agent of defendant at Clarksville before 9 o'clock in the morning of April 1st, and was at once given to a messenger to deliver. After an absence of several hours he returned it with the statement that he could not find the person to whom it was addressed. The agent then sent a service message to the office at Warren, stating that plaintiff was unknown in Clarksville, and asking for a better address. At noon of Wednesday he received an answer stating that plaintiff was a patent fence man, and would be found in town. At about the time that dispatch reached the agent at Clarksville, the plaintiff received a letter from B. B. Herron, telling of the trade, and asking why the dispatch had not been answered. The plaintiff then went to the office, and sent a dispatch to his brother to do the best he could with Cassidy. While he was there, the dispatch of his brother was delivered to

¹ For discussion of principles, see Hale on Damages (2d Ed.) § 123.

² Part of the opinion is omitted.

him. His dispatch was not delivered to his brother until Wednesday evening, and Cassidy was not seen until the next day, when he refused to take the horse. The plaintiff returned to Lee county in July, and took the horse to Nebraska, where he sold him for \$50. He seeks to recover in this action the damages he claims to have sustained in consequence of the failure of defendant to deliver the message in time for him to accept the offer of Cassidy. The judgment was rendered for \$177.65, the amount of the verdict, with interest and costs. * * *

The court charged the jury that, if plaintiff was entitled to recover, the measure of damages would be the difference between the price he would have received from Cassidy and the price he afterwards obtained for the horse, and the reasonable value of the care and keeping of the horse, with 6 per cent. interest from the time the horse was sold. The appellant contends that the measure of damage given by the charge was erroneous. The blank on which the message sent was written stated that errors and delays might be prevented by repetition, for which an extra price would be charged, but that defendant would receive night messages, to be sent without repetition, at a reduced rate, "and upon the express condition that the sender will agree that he will not claim damages for errors or delays, or for nondelivery of such message, happening from any cause, beyond a sum equal to ten times the amount paid for transmission." We do not understand the appellant to claim that the plaintiff is bound by the provisions quoted, but it contends that it had no knowledge of the transaction out of which the message grew; that the message did not disclose the interests which were dependent upon it; and that defendant should not be charged with any liability which it cannot be reasonably said would be an ordinary and natural result of a failure to transmit the message within a reasonable time, and therefore contemplated by the parties when the defendant undertook to send the message. The evidence shows that the agent of defendant at Warren knew of the horse when the message was given him to send, that it related to a pending trade, and that an answer was expected. Knowledge of these facts was sufficient to authorize the jury to find that defendant should be charged with knowledge of the importance of the message when it was received. *Garrett v. Telegraph Co.*, 83 Iowa, 262, 49 N. W. 88.

It is claimed that, if defendant is liable to plaintiff for all the damages he sustained by reason of the delay in transmitting the message, the measure of that damage is the difference between the market value of the horse and the price which Cassidy would have paid for him had his offer been accepted. That would probably have been true had there been a market value for the horse, but the evidence shows that there was not. He was an inferior animal, and valuable only for breeding purposes. There was no market

for that kind of horses in Lee county and vicinity. George Herron, who had charge of the one in question, made diligent effort to sell him after the 31st day of March until he was taken to Nebraska, but without success. The plaintiff also personally made every effort possible to effect a sale, and finally took the horse to Nebraska, and traded him for land, receiving for him \$50 in value. It is not true, as a general rule of law, in such cases as this, that the plaintiff would be entitled to recover the difference between the price he would have received had he been able to accept the offer and the price he actually received, but it appears that the plaintiff in fact sold the horse for all which could have been realized for him with reasonable effort to secure the best price attainable. The value of the property Cassidy offered for the horse was \$250; hence plaintiff sold him for \$200 less than the amount of Cassidy's offer. It was necessary for plaintiff to pay the expense of keeping the horse from the 2d day of April until he was sold, and the evidence sustains the allowance, if any, made by the jury for that purpose. The loss in price, and the expense of keeping the horse, with interest, represented actual damages which the plaintiff sustained by not accepting the offer of Cassidy; and it is the policy of the law to permit a person injured by the wrong of another to recover the amount of his loss. Where the loss results from a failure to sell the property for which there is no market value, its actual value may be ascertained by means of the best evidence of which the case admits. 3 Suth. Dam. 476; 1 Sedg. Dam. § 250; Wood, Mayne, Dam. § 22; *White v. Cattle Co.*, 75 Tex. 465, 12 S. W. 867.

We conclude that the measure of damages adopted by the court as applied to the facts in this case was not erroneous. * * * We find no sufficient ground for disturbing the judgment of the district court, and it is therefore affirmed.

II. Same—Remote and Speculative Damages³

WESTERN UNION TELEGRAPH CO. v. TWADDELL²

(Court of Civil Appeals of Texas, 1907. 47 Tex. Civ. App. 51, 103 S. W. 1120.)

Action by M. N. Twaddell against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals.

CONNER, C. J.⁴ The court below awarded appellee a judgment for \$400 as commissions or profits that the court found would have

³ For discussion of principles, see Hale on Damages (2d Ed.) § 124.

⁴ Part of the opinion is omitted.

been received by him upon a sale of land that could and would have been effected but for appellant's negligence in failing to deliver a telegram to appellee's brother, J. J. Twaddell. * * *

As shown by the evidence, the telegram delivered by appellee for transmission was as follows: "6—26—1906. J. J. Twaddell, Waco, Texas. You can make big money next month—come at once. M. N. Twaddell." Appellee testified that he was a real estate agent, and that as such he had, at the date of the telegram, listed with him for sale 1,600 acres of land in Dallam county at \$2.50 per acre, and that, had the telegram been delivered to J. J. Twaddell promptly, J. J. Twaddell would have procured a purchaser for the land at \$2.75 per acre, which would have given a net profit to him, M. N. Twaddell, of 25 cents per acre, or the total sum of \$400, which was the amount for which he sued in this case. J. J. Twaddell testified that one of his friends, T. W. Garrett, residing at Beaumont, Tex., would have purchased the land at \$2.75 per acre, had he received the telegram. Other proof showed failure to deliver the telegram by reason of the negligence of appellant's employés at Waco, Tex., where J. J. Twaddell resided, and that the owner sold the land to other parties on July 8th before Mr. Garrett could go to Dalhart and close the contract with appellee.

No notice other than that to be inferred from the face of the telegram is alleged or shown to have been given to appellant, and the telegram, both as alleged and proved, is wholly insufficient to convey notice to appellant of the special damages sought and recovered in this case. Special damages, such as would not naturally or ordinarily follow from a breach of a contract, will not be awarded, unless it be shown that the party sought to be charged with the breach had knowledge of the peculiar circumstances from which the damage might arise. In other words, it must be alleged and proved that the particular loss was in contemplation of both the parties to the contract, at the time it was made, as a contingency that might follow the nonperformance. This principle has been so frequently decided that it seems superfluous to cite any authority; but see *Daniel v. W. U. Tel. Co.*, 61 Tex. 452, 48 Am. Rep. 308, *Elliott v. W. U. Tel. Co.*, 75 Tex. 18, 12 S. W. 954, 16 Am. St. Rep. 872, and *W. U. Tel. Co. v. Williford*, 2 Tex. Civ. App. 574, 22 S. W. 244.

The telegram as declared upon in the petition wholly fails to indicate that the failure to deliver would result in the consequences shown and relied upon in this case. Indeed, both as declared upon and as proved, the damage for failure to deliver seems wholly speculative. * * * It is ordered that the judgment be reversed, and the cause remanded for a new trial.

III. Same—Damages Not Within Contemplation of Parties— Notice of Purpose and Importance of Message⁵

WESTERN UNION TELEGRAPH CO. v. MILTON.

(Supreme Court of Florida. 1907. 53 Fla. 484, 43 South. 495, 11 L. R. A. [N. S.] 560, 125 Am. St. Rep. 1077.)

Action by John Milton, Jr., against the Western Union Telegraph Company for damages for failure to transmit and deliver a correct copy of a telegram received from plaintiff for transmission. There was a judgment for plaintiff for \$133.50 and \$20 interest. The defendant brings error.

WHITFIELD, J.⁶ * * * Exception was taken to, and error is assigned on, the refusal of the court to give the following charge requested by the defendant: "(2) The evidence having been closed and the argument of counsel concluded, the court instructs you that under the undisputed facts the plaintiff can recover only the tolls paid for sending the telegram which is the basis of this suit to the extent of the amount proved to have been paid to the defendant company for tolls for transmitting the message, together with interest at the rate of 8 per cent. per annum from the date the same was paid."

The declaration alleges, and the proof shows: That George H. McFadden & Bros. Agency, of Pensacola, Fla., had agreed to take and receive from John Milton, Jr., the plaintiff, of Marianna, Fla., at 10 cents per pound, all the cotton of middling grade bought by plaintiff on a given day, upon plaintiff's reporting by wire the number of bales so bought on said day. That on September 24, 1904, the plaintiff delivered to the defendant the following message: "Marianna, Florida, 9—24—04. George H. McFadden & Bros. Agency, Pensacola, Florida: Bought for your account to-day's limit 175. Am doing my best to rush bill lading. John Milton, Jr." That the words "one hundred and seventy-five" meant 175 bales of cotton, which plaintiff had that day purchased for said agency. That defendant, in transmitting said message, negligently and carelessly substituted and used the words "one hundred and twenty-five" in the place and stead of the words "one hundred and seventy-five." That said agency, being only advised of the purchase of 125 bales of cotton by plaintiff, by reason of the defendant's said error and negligence, would only receive as purchased on said day 125 bales of cotton, and rejected the other 50 bales. That the market price

⁵ For discussion of principles, see Hale on Damages (2d Ed.) § 125.

⁶ Part of the opinion is omitted and the statement of facts is rewritten.

of cotton declined, and the 50 bales brought only 9½ cents per pound, to the plaintiff's loss of \$133.50. It is further alleged that defendant well knew that the George H. McFadden & Bros. Agency was engaged in dealing in cotton, and that the plaintiff had been engaged in shipping cotton to and buying cotton for said agency. The proofs show that the agent of the telegraph company, who was also the agent of the railroad, knew plaintiff's business, and had sent similar messages daily, and he had to sign the bills of lading as agent for the railroad; that said agent knew McFadden Bros. were cotton buyers, and that the plaintiff had an agreement with them to buy cotton for them on the limits given plaintiff each day by means of the defendant telegraph company.

In cases where losses have been sustained by reason of the negligence of another, damages may be recovered for losses that would likely or probably result, where such negligence is a proximate or directly contributing cause of the loss, and the plaintiff is not at fault. The damages must be for losses that would likely or probably result, and did result, from the proximate or directly contributing negligence of the defendant, and the plaintiff must not be at fault. If there is an independent efficient cause intervening between the negligence of the defendant and the result or loss, the defendant's negligence is not a proximate or directly contributing cause. If the plaintiff is not at fault, and the negligence of the defendant was one of the proximate or directly contributing causes, the defendant is liable for the loss, without reference to other proximate or directly contributing causes, where they do not intervene between the negligence of the defendant and the result or loss. A proximate cause is one that leads to or produces, or directly contributes to producing, the result or loss. If the loss is not such as would likely or probably result from the negligence of the defendant, he is not liable, since he can ordinarily be held responsible only for the probable results of his negligence which he should have foreseen. * * *

In an action in tort against a telegraph company for the breach of a public duty in negligently transmitting an incorrect copy of a message delivered to it for transmission, the damages that can be recovered are for the loss or injury sustained by the plaintiff as a proximate consequence of the defendant's negligent act, which consequence the parties contemplated or should have contemplated as probably to follow from a breach of the duty. An act is a proximate cause when it leads to or produces, or contributes directly to producing, a result. When a result might have been reasonably expected as likely or probably to directly follow the performance or nonperformance of an act, the party performing or failing to perform the act is responsible for the loss to another resulting proximately from the performance or nonperformance of the act. * * *

It appears that in this case the McFadden Agency would have been obliged under the contract with the plaintiff to take 175 bales of cotton at 10 cents per pound if the defendant had correctly transmitted the message it received from plaintiff for transmission. Because of the negligence of the defendant in transmitting the message incorrectly, the McFadden Agency was obliged to take only 125 bales of cotton at 10 cents a pound, and consequently such negligence is the proximate cause of the loss to the plaintiff of $\frac{1}{2}$ cent a pound on 50 bales of cotton which sold for $9\frac{1}{2}$ cents per pound the best market price; and from the allegations of the declaration and the proofs it appears that such loss is one that the parties knew or had reason to know would probably follow from an incorrect transmission of the message. If the defendant's negligence in the performance of its duty was a proximate cause of the loss to the plaintiff and the plaintiff is not at fault, he may recover for the loss sustained that the parties contemplated or under the circumstances should have contemplated as likely and probably to result from such negligence.

It is urged that the plaintiff cannot recover damages in excess of the toll collected, because it is not shown that the error in the transmission of the message was the proximate cause of the loss, as it does not appear that plaintiff "made any attempt to secure a better price for this cotton, or that he offered the same to any other person, or that he could not by holding it have obtained a better price." The contract of plaintiff with the McFadden Agency was that the agency would take and receive from plaintiff all the cotton he could buy at 10 cents per pound upon a basis of middling cotton, upon the plaintiff reporting by wire to said agency the number of bales so bought on said day. The loss to the plaintiff could not have been avoided, because the agency was not bound to take more cotton than was reported to it by telegram, and, as the market declined, a sale to others at 10 cents per pound was impracticable, and the 50 bales were sold, at the best market price for $9\frac{1}{2}$ cents per pound. The plaintiff was not required to hold the 50 bales for a rise in the market, but he had a right to expect the defendant to properly perform its duty of correctly transmitting the telegram, so as to bind the McFadden Agency to take the entire 175 bales at that day's price, even if the market declined; but as the message was incorrectly transmitted, and as the McFadden Agency was bound to take and did take at 10 cents per pound only the lesser number of bales stated in the telegram as received by it, the loss to the plaintiff by the refusal of the McFadden Agency to take at the given price more than the 125 bales stated in the message received was caused directly by the failure of the telegraph company to correctly transmit the message. The difference in the price was not within the control of the plaintiff.

The message contained no element of speculation or contingency.

The plaintiff was not buying for speculation, but bought at a stated price for another, who was to take at that price all the cotton reported by wire that day pursuant to an agreement. A correct report was filed for transmission by the defendant telegraph company, but the company incorrectly transmitted it. The plaintiff would have had a right to hold the McFadden Agency to take the 175 bales at 10 cents per pound, notwithstanding a decline in the market price, if a correct copy of the message filed had been transmitted and delivered, and no loss to plaintiff would have resulted. But the message was not correctly transmitted by the defendant telegraph company, as it reported 125 bales, instead of 175 bales. The McFadden Agency was not bound to take at 10 cents per pound any more cotton than was reported to it by wire that day, and as the market declined $\frac{1}{2}$ cent a pound, and plaintiff was paid only $9\frac{1}{2}$ cents per pound for 50 bales, the same being then the highest market price, loss resulted to the plaintiff directly from failure of the defendant telegraph company to correctly transmit the message. This loss was one that the parties could and should have known, from the telegram and other facts known to the company, would probably result from the negligence of the defendant. The amount of recovery is the difference between the price the McFadden Agency would have paid the plaintiff for the 50 bales of cotton if the message had been correctly transmitted and the highest market price paid the plaintiff for the 50 bales of cotton. See *Thompson v. Western U. Tel. Co.*, 64 Wis. 531, 25 N. W. 789, 54 Am. Rep. 644; *Manville v. Western Union Tel. Co.*, 37 Iowa, 214, 18 Am. Rep. 8; *Western Union Tel. Co. v. Nye & Schneider Grain Co.*, 70 Neb. 251, 97 N. W. 305, 63 L. R. A. 803; *Reed v. Western Union Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609; *Western Union Tel. Co. v. Haman*, 2 Tex. Civ. App. 100, 20 S. W. 1133; *Western Union Tel. Co. v. Spivey*, 83 S. W. 364, 98 Tex. 308. There is no showing that the plaintiff did not act in good faith and get all that could have been obtained from the sale of the 50 bales of cotton left on his hands by reason of the incorrect transmission of the message. On the contrary, it is shown that the 50 bales were sold for the best market price.

It is contended that the terms of the message did not indicate that the damages claimed were in the contemplation of the parties. The declaration alleges that the defendant telegraph company well knew that the McFadden Agency was engaged in dealing in cotton and that the plaintiff had been engaged in shipping cotton to and buying cotton for said agency. It is also shown in evidence that the agent of the telegraph company was also the agent of the railroad company; that he had transmitted similar messages daily, and he had to sign bills of lading for the railroad. It also appears that this agent knew the business of the plaintiff with the Mc-

Fadden Agency, as to which messages had been sent and bills of lading signed by the agent. It is a matter of common knowledge that the price of cotton fluctuates. The company appears to have well known of the buying and shipping of cotton by the plaintiff for the agency. The telegram was addressed to the agency, and its terms indicated its importance and probable reference to shipment of cotton about which defendant knew.

The terms of the message and the circumstances known to the company when the message was presented for transmission were reasonably sufficient for the defendant to contemplate therefrom that the losses sustained by the plaintiff would probably result from a negligent transmission of the message. It was not essential that the particular loss sustained was contemplated, but the company is liable if the loss sustained should have been contemplated as a probable and proximate result of the negligence. *Jones on Telegraphs and Telephones*, §§ 519-529; *Western Union Tel. Co. v. Edsall*, 74 Tex. 329, 12 S. W. 41, 15 Am. St. Rep. 835.

Under the circumstances the terms of the message were sufficient to put the defendant upon notice that matters of considerable value were involved, and it was bound to exercise care accordingly. *Western Union Tel. Co. v. Edsall*, *supra*. If nothing of value was involved, the defendant was by law held to a proper discharge of its duty by transmitting and delivering a correct copy of the message received by it for transmission. The knowledge of the defendant's agent of the plaintiff's business and the terms of the message amply indicated its importance. The damage here alleged is the proximate result of defendant's negligence, and the law imposes liability for such negligence. See *Jones on Telegraphs and Telephones*, § 538. The charge numbered 2, requested by defendant, was properly refused.

The decline in the market price of cotton was not an independent efficient cause intervening between the negligence of the defendant and the plaintiff's loss. If the message had been correctly transmitted, the decline in the market price of cotton would not have resulted in loss to the plaintiff. Even if the decline in the price were a directly contributing cause of the loss, the correct transmission of the message would have avoided a loss, notwithstanding the decline in the price. Therefore the negligence of the defendant was at least a proximate cause of the loss. * * *

It does not appear from the allegations or the proofs that the injury complained of was the result of any independent intervening cause. No wrongdoing, negligence, or lack of good faith on the part of the plaintiff appears. The defendant telegraph company failed to properly perform its duty by not transmitting a correct copy of the message received by it for transmission. Such failure has resulted in loss to the plaintiff, without his fault and without the intervention of any independent cause; and the defendant is

therefore liable in damages to the amount of the loss directly sustained by the plaintiff, that should probably have resulted and did result from the defendant's negligence. Damages under this rule have been adjudicated to the plaintiff. * * * The judgment is affirmed.

IV. Same—Cipher Messages ⁷

PRIMROSE v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of United States, 1894. 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883.)

In error to the circuit court of the United States for the eastern district of Pennsylvania.

This was an action on the case, brought January 25, 1888, by Frank J. Primrose, a citizen of Pennsylvania, against the Western Union Telegraph Company, to recover damages for a negligent mistake of the defendant's agents in transmitting a telegraphic message. On June 16, 1887, the plaintiff wrote and delivered to the defendant, at Philadelphia, for transmission to his agent, William B. Toland, at Ellis, in the state of Kansas, a message: "To Wm. B. Toland, Ellis, Kansas. Despot am exceedingly busy bay all kinds quo perhaps bracken half of it mince moment promptly of purchases. Frank J. Primrose."

On the evening of the same day, an agent of the defendant delivered to Toland, at Waukeney, upon a blank of the defendant company, the message in this form: "To W. B. Toland, Waukeney, Kansas. Destroy am exceedingly busy buy all kinds quo perhaps bracken half of it mince moment promptly of purchase. Frank J. Primrose."

The difference between the message as sent and as delivered is shown below, where so much of the message sent as was omitted in that delivered is in brackets, and the words substituted in the message delivered are in italics: "[Despot] *Destroy* am exceedingly busy [bay] *buy* all kinds quo perhaps bracken half of it mince moment promptly of purchase[s]."

By the private cipher code made and used by the plaintiff and Toland, the meaning of these words was as follows: "Yours of the [fifteenth] *seventeenth* received; am exceedingly busy; [I have bought] *buy* all kinds, five hundred thousand pounds; perhaps we have sold half of it; wire when you do anything; send samples immediately, promptly of [purchases] *purchase*."

⁷ For discussion of principles, see Hale on Damages (2d Ed.) § 126.

The plaintiff testified that he then was, and for many years had been, engaged in the business of buying and selling wool all over the country, and had employed Toland as his agent in that business and early in June, 1887, sent him out to Kansas and Colorado, with instructions to buy 50,000 pounds, and then to await orders from him before buying more; that, before June 12th, Toland bought 50,000 pounds, and then stopped buying; and that he had sent many telegraphic messages to Toland during that month and previously, using the same code.

The defendant's agent at Philadelphia, called as a witness for the plaintiff, testified that he sent this message for the plaintiff, and knew that he was a dealer in wool, and that Toland was with him, but in what capacity he did not know; that he had frequently sent messages for him, and considered him one of his best customers during the wool season.

The plaintiff also introduced evidence tending to show that Toland, upon receiving the message at Waukeney, made purchases of about 300,000 pounds of wool; and that the plaintiff, in settling with the sellers thereof, suffered a loss of upward of \$20,000.

The circuit court, following *White v. Telegraph Co.*, 5 McCrary, 103, 14 Fed. 710, and *Jones v. Telegraph Co.* (C. C.) 18 Fed. 717, ruled that there was no evidence of gross negligence on the part of the defendant; and that, as the message had not been repeated, the plaintiff, by the terms printed upon the back of the message, and referred to above his signature on its face, could not recover more than the sum of \$1.15, which he had paid for sending it. The plaintiff not claiming that sum, the court directed a verdict for the defendant, and rendered judgment thereon. The plaintiff tendered a bill of exceptions, and sued out this writ of error.

Mr. Justice GRAY, after stating the case, delivered the opinion of the court.* * * *

Under any contract to transmit a message by telegraph, as under any other contract, the damages for a breach must be limited to those which may be fairly considered as arising according to the usual course of things from the breach of the very contract in question, or which both parties must reasonably have understood and contemplated, when making the contract, as likely to result from its breach. This was directly adjudged in *Telegraph Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479.

In *Hadley v. Baxendale* (decided in 1854) 9 Exch. 345, ever since considered a leading case on both sides of the Atlantic, and approved and followed by this court in *Telegraph Co. v. Hall*, above cited, and in *Howard v. Manufacturing Co.*, 139 U. S. 199, 206, 207, 11 Sup. Ct. 500, 35 L. Ed. 147; Baron Alderson laid down, as the principles by which the jury ought to be guided in estimating

* The statement is abridged from that in the official report and part of the opinion is omitted.

the damages arising out of any breach of contract, the following: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally—i. e. according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract." 9 Exch. 354, 355. * * *

In *Telegraph Co. v. Gildersleve*, already referred to, which was an action by the sender against a telegraph company for not delivering this message received by it in Baltimore, addressed to brokers in New York "Sell fifty (50) gold," Mr. Justice Alvey, speaking for the court of appeals of Maryland, and applying the rule of *Hadley v. Baxendale*, above cited, said: "While it was proved that the dispatch in question would be understood among brokers to mean fifty thousand dollars in gold, it was not shown, nor was it put to the jury to find, that the appellant's agents so understood it, or whether they understood it at all. 'Sell fifty gold' may have been understood in its literal import, if it can be properly said to have any, or was as likely to be taken to mean fifty dollars as fifty thousand dollars by those not initiated; and, if the measure of responsibility at all depends upon a knowledge of the special circumstances of the case, it would certainly follow that the nature of this dispatch should have been communicated to the agent at the time it was offered to be sent, in order that the appellant might have observed the precautions necessary to guard itself against the risk. But without reference to the fact as to whether the appellant had knowledge of the true meaning and character of the dispatch, and was thus enabled to contemplate the consequences of a breach of the contract, the jury were instructed that the appellee was entitled to recover to the full extent of his loss by the decline in gold. In thus instructing the jury, we think the court committed error, and that its ruling should be reversed." 29 Md. 232, 251, 96 Am. Dec. 519.

In *Baldwin v. Telegraph Co.*, which was an action by the senders against the telegraph company for not delivering this message, "Telegraph me at Rochester what that well is doing," Mr. Justice Allen, speaking for the court of appeals of New York, said: "The message did not import that a sale of any property or any business transaction hinged upon the prompt delivery of it, or upon any answer that might be received. For all the purposes for which the plaintiffs desired the information, the message might as well have been in a cipher or in an unknown tongue. It indicated nothing to put the defendant upon the alert, or from which it could be inferred that any special or peculiar loss would ensue from a non-delivery of it. Whenever special or extraordinary damages, such as would not naturally or ordinarily follow a breach, have been awarded for the nonperformance of contracts, whether for the sale or carriage of goods or for the delivery of messages by telegraph, it has been for the reason that the contracts have been made with reference to peculiar circumstances known to both, and the particular loss has been in the contemplation of both, at the time of making the contract, as a contingency that might follow the non-performance." "The dispatch not indicating any purpose other than that of obtaining such information as an owner of property might desire to have at all times, and without reference to a sale, or even a stranger might ask for purposes entirely foreign to the property itself, it is very evident that, whatever may have been the special purpose of the plaintiffs, the defendant had no knowledge or means of knowledge of it, and could not have contemplated either a loss of a sale, or a sale at an undervalue, or any other disposition of or dealing with the well or any other property, as the probable or possible result of a breach of its contract. The loss which would naturally and necessarily result from the failure to deliver the message would be the money paid for its transmission, and no other damages can be claimed upon the evidence as resulting from the alleged breach of duty by the defendant." 45 N. Y. 744, 749, 750, 752, 6 Am. Rep. 165. See, also, *Hart v. Cable Co.*, 86 N. Y. 633.

The supreme court of Illinois, in *Tyler v. Telegraph Co.*, above cited, took notice of the fact that in that case "the dispatch disclosed the nature of the business as fully as the case demanded." 60 Ill. 434, 14 Am. Rep. 38. And in the recent case of *Cable Co. v. Lathrop* the same court said: "It is clear enough that, applying the rule in *Hadley v. Baxendale*, supra, a recovery cannot be had for a failure to correctly transmit a mere cipher dispatch, unexplained, for the reason that to one unacquainted with the meaning of the ciphers it is wholly unintelligible and nonsensical. An operator would therefore be justifiable in saying that it can contain no information of value as pertaining to a business transaction, and a failure to send it or a mistake in its transmission can reasonably

result in no pecuniary loss." 131 Ill. 575, 585, 23 N. E. 583, 585, 7 L. R. A. 474, 19 Am. St. Rep. 55.

The same rule of damages has been applied, upon failure of a telegraph company to transmit or deliver a cipher message, in one of the Wisconsin cases cited by the plaintiff, and in many cases in other courts. *Candee v. Telegraph Co.*, 34 Wis. 471, 479-481, 17 Am. Rep. 452; *Beaupre v. Telegraph Co.*, 21 Minn. 155; *Mackay v. Telegraph Co.*, 16 Nev. 222; *Daniel v. Telegraph Co.*, 61 Tex. 452, 48 Am. Rep. 305; *Cannon v. Telegraph Co.*, 100 N. C. 300, 6 S. E. 731, 6 Am. St. Rep. 590; *Telegraph Co. v. Wilson*, 32 Fla. 527, 14 South. 1, 22 L. R. A. 434, 37 Am. St. Rep. 125; *Behm v. Telegraph Co.*, 8 Biss. 131, Fed. Cas. No. 1,234; *Telegraph Co. v. Martin*, 9 Ill. App. 587; *Abeles v. Telegraph Co.*, 37 Mo. App. 554; *Kinghorne v. Telegraph Co.*, 18 U. C. Q. B. 60, 69.

In the present case the message was, and was evidently intended to be, wholly unintelligible to the telegraph company or its agents. They were not informed, by the message or otherwise, of the nature, importance, or extent of the transaction to which it related, or of the position which the plaintiff would probably occupy if the message were correctly transmitted. Mere knowledge that the plaintiff was a wool merchant, and that Toland was in his employ, had no tendency to show what the message was about. According to any understanding which the telegraph company and its agents had, or which the plaintiff could possibly have supposed that they had, of the contract between these parties, the damages which the plaintiff seeks to recover in this action, for losses upon wool purchased by Toland, were not such as could reasonably be considered, either as arising, according to the usual course of things, from the supposed breach of the contract itself, or as having been in the contemplation of both parties, when they made the contract, as a probable result of a breach of it.

In any view of the case, therefore, it was rightly ruled by the circuit court that the plaintiff could recover in this action no more than the sum which he had paid for sending the message. Judgment affirmed.

Mr. Chief Justice FULLER and Mr. Justice HARLAN dissented.

DAMAGES FOR DEATH BY WRONGFUL ACT

I. Damages in Statutory Action—Pecuniary Loss¹

FLORIDA CENTRAL & P. R. CO. v. FOXWORTH.

(Supreme Court of Florida, 1899. 41 Fla. 1, 25 South. 338, 79 Am. St. Rep. 149.)

Action by Sarah A. Foxworth against the Florida Central & Peninsular Railroad Company for damages for the death of plaintiff's husband alleged to have been caused by the negligence of the railroad company. There was a verdict for plaintiff for \$25,000. Defendant's motion for new trial was denied on plaintiff's entering a remittitur for \$20,000, and judgment entered for plaintiff. Defendant appeals.

CARTER, J.² * * * By the common law no damages were recoverable for the death of a human being. We are, therefore, without precedents as to the measure of damages in cases of this character, other than those based upon the construction of statutes varying in their language. A great majority of the courts of this country have held that in actions of this character the loss of the society of the deceased cannot be considered in estimating damages. The basis for this array of precedents is the opinion of the English court, construing Lord Campbell's Act, in *Blake v. Railway Co.*, 16 Jur. 562. We have examined a multitude of these cases, and in none of them have we found any reason given for disallowing this element, except in *Railroad Co. v. Zebe*, 33 Pa. 318; and the decision in this case is confessedly based upon, and the reasons given are practically those of, the English case. In the Pennsylvania case the main question considered was whether damages for mental suffering or wounded feelings could be allowed, and incidentally the court held that loss of society falls within the same category with mental suffering, and should be disallowed. The English case, though confined entirely to the question of mental suffering, has been generally cited as authority for excluding damages for loss of the society and protection of a husband. The reasoning of that decision is based upon four propositions: First, the title of the act, "An act for compensating the families of persons killed by accident," not "for solacing their wounded feelings"; second, the provision requiring the jury to divide between the persons for whose benefit the action was brought the amount recov-

¹ For discussion of principles, see Hale on Damages (2d Ed.) §§ 130-132.

² Part of the opinion is omitted and the statement of facts is rewritten.

ered in such shares as they thought proper, and the impracticability of estimating and dividing the damages for mental anguish of and between the numerous persons for whose benefit the action is brought; third, because the language of the act seemed more appropriate to a loss of which some estimate might be made by calculation than an indefinite sum, independent of all pecuniary estimate, to soothe the feelings; and, fourth, "if a jury were to proceed to estimate the relative degrees of mental anguish of a widow and twelve children from the death of the father of the family, a serious danger might arise of damages being given to the ruin of the defendants." In the Pennsylvania case it is said that such damages are speculative and fanciful, and it is there asserted that the great merit of the English rule is that "it is one of equality, compensating the rich and the poor, the refined and the cultivated, and those less so, by the simple standard of pecuniary loss."

While our statute has several features in common with Lord Campbell's Act, it is essentially different in many important particulars. Unlike the English statute, it is not one for "compensating families," but one "fixing the liability of persons and corporations for damages resulting from death," etc. Our statute, unlike the English one, by giving a right of action to the administrator of the deceased, imposes the liability whether there be a family to compensate or not. Its effect was to abrogate the common-law rule, for which, if any reason ever existed, the world has long since outgrown it, denying damages for human life, and to affix a penalty by an award of pecuniary damages for a careless or wrongful act resulting in another's death. In authorizing suits to enforce this liability, our act gives the right to those who are supposed to suffer most by the death of the deceased, but on no account does the action fail for want of a person to sue, as with Lord Campbell's Act. Other points of dissimilarity between them are: Under the English statute the suit is brought by the administrator for the benefit of the beneficiaries, while the beneficiaries sue directly under our statute. Under the English statute the jury are required to apportion or divide the recovery among all the beneficiaries, while under ours no division is made by the jury; and, indeed, if there be a husband or wife surviving, the exclusive right of action inures to him or her without reference to other members of the family. And so with minor children and dependents, the existence of a higher class of persons authorized to sue in the order named in the statute debars all other classes from any right of action themselves, or from participation in the recovery by the higher class. *Duval v. Hunt*, 34 Fla. 85, 15 South. 876. In the *Duval-Hunt* Case we held that, where the suit was brought by dependents, their recovery was limited to an amount equal to the present worth of a future support for plaintiff, estimated upon the basis therein mentioned.

This view is entirely consistent with, and plainly conformable to, the nature and extent of the damages proximately suffered by one dependent upon the deceased for a support only, because he has lost nothing by the death of the deceased except the support which he would have received had deceased lived; but it was not thereby determined, as insisted upon by the appellant, that the same rule for assessing damages for a dependent would apply to a suit by the wife, or any other person authorized by the statute to sue. Our statute requires the jury to give such damages "as the party entitled to sue may have sustained by reason of the death of the party killed"; not such damages as the deceased might have recovered had he lived, as contended by appellee. It is clear, therefore, that a widow is not entitled to recover for the pain and suffering of the deceased, because that is not a damage sustained by her, but by the deceased, and dies with his person, unless an administrator can recover therefor, in a suit by him under the statute, as to which we express no opinion. The statute failing to declare what particular elements enter into the damages sustained by a widow by reason of the death of her husband, and the common law furnishing no guide for estimating damages sustained by one from the death of another, we must necessarily have recourse to the general rules governing the assessment of damages in other actions, and among the first we find that "the object of awarding damages is to give compensation for pecuniary loss; that is, to put the plaintiff in the same position, so far as money can do it, as he would have been if * * * the tort had not been committed." 1 Sedg. Meas. Dam. § 30. Another is that the damage to be recovered must always be the natural and proximate consequence of the act complained of. 1 Sedg. Meas. Dam. § 122.

Applying these principles to this case, it is proper to inquire, who is the plaintiff? Of what wrongful act does she complain? What has been the natural and proximate consequence to her; or, stated differently, what has she directly lost by reason of this wrongful act? The answers are not difficult to give. She is a widow complaining of the death of her husband by the wrongful act of another, and she has lost all the rights and benefits which she would have had a legal claim to receive during the probable joint lives of herself and husband, and those accruing after his death, had she survived him. Chief among those accruing to her during their joint lives are the comfort, society, protection, and support of the husband. They are all eloquently expressed in that portion of the marriage ceremony constituting the contract between them, whereby the man is required "to love her, comfort her, honor and keep her in sickness and in health." There can be no question that the wife's right to the society of the husband is a recognized legal right, as much so as the right to his support. When one of the parties dies by the wrongful act of another, the consequences

are not merely the annulment of a contract, or the ending of a partnership organized for pecuniary gain, but the dissolution of the only status known to the law in which the companionship and society of the parties to each other is so essential that the relation will be annulled if that society be willfully withdrawn. The word "husband" or "wife," disassociated from all idea of companionship, has but an empty sound.

The Pennsylvania court in a later case (*Railroad Co. v. Goodman*, 62 Pa. 329) recognizes the injustice of denying compensation for companionship of husband and wife in cases of this character by holding that the husband's damages are to be "measured by the value of her services as a wife or companion; * * * that the pecuniary loss was to be measured by the nature of the service, characterized as it was by the relation in which the parties stood to each other. Certainly, the service of a wife is pecuniarily more valuable than that of a mere hireling. The frugality, industry, usefulness, attention, and tender solicitude of a wife and the mother of children surely make her services greater than those of an ordinary servant, and therefore worth more. These elements are not to be excluded from the consideration of a jury in making a mere money estimate of value." The comfort, society, and protection of a husband are no more fanciful or speculative than the frugality, industry, usefulness, attention, and tender solicitude of a wife; and the one can be as well compensated by that simple standard of pecuniary loss by which the damages of the rich and the poor, the refined and cultivated, and those less so are measured, as the other. The right of a husband to recover damages for being deprived of the society of his wife by reason of injuries inflicted by the negligence of another has been often recognized at common law, though not in cases involving death; and it has never been considered that the damages on this account were either speculative, fanciful, or liable to bankrupt a defendant. *Jones v. Railroad Co.*, 40 Hun (N. Y.) 349; *Ainley v. Railway Co.*, 47 Hun (N. Y.) 206; *Blair v. Railroad Co.*, 89 Mo. 334, 1 S. W. 367; *Furnish v. Railway Co.*, 102 Mo. 669, 15 S. W. 315, 22 Am. St. Rep. 800.

In the following cases loss of society has been held a proper element for consideration in estimating damage under various statutes in this class of cases, some of them confining such element to actions by a husband or widow: *Railroad Co. v. Freeman*, 97 Ala. 289, 11 South. 800; *Munro v. Reclamation Co.*, 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248; *Pepper v. Pacific Co.*, 105 Cal. 389, 38 Pac. 974; *Petrie v. Railroad Co.*, 29 S. C. 303, 7 S. E. 515; *Baltimore & O. R. Co. v. State*, 24 Md. 271; *Webb v. Railway Co.*, 7 Utah, 17, 24 Pac. 616; *Railroad Co. v. Noell's Adm'r*, 32 Grat. (Va.) 394; *Simmons v. McConnell*, 86 Va. 494, 10 S. E. 838; *Wells v. Railway Co.*, 7 Utah, 482, 27 Pac. 688; *Hyde v. Railway Co.*, 7 Utah, 356, 26 Pac. 979.

The case of *Webb v. Railway Co.*, 7 Utah, 17, 24 Pac. 616, has been cited to sustain the proposition that loss of society is not an element of damage in this class of cases. That case holds that a mother is entitled to recover only her pecuniary loss, and not for mental pain and suffering caused by the death of a child, in an action for damages under a statute somewhat similar to Lord Campbell's Act, but it is there admitted that the word "pecuniary," in this connection, "is not construed in any very strict sense, and the tendency is to still greater liability, and to include every element of injury that may be deemed to have a pecuniary value, although this value may not be susceptible of positive proof, and can only be vaguely estimated. It may include the loss of nurture, of the intellectual, moral, and physical training which a mother only can give to children; * * * the loss of the society of a near relative." The same court has held that while nothing is to be allowed for mental suffering, or as a solace for feelings, the jury may allow damages to a widow and daughter for being deprived of the support, care, nurture, companionship, assistance, and protection of the deceased (*Wells v. Railway Co.*, 7 Utah, 482, 27 Pac. 688); and in an action by parents, that the jury may take into consideration the loss to the parents of the society of their child (*Hyde v. Railway Co.*, 7 Utah, 356, 26 Pac. 979).

Under our statute we hold that in estimating the pecuniary loss sustained by a widow in consequence of the death of her husband the jury may properly take into consideration the loss of the comfort, protection, and society of the husband in the light of all the evidence in the case relating to the character, habits, and conduct of the husband as husband, and to the marital relations between the parties at the time of and prior to his death. The sixth instruction on behalf of the plaintiff was properly given, and the court correctly refused the fourteenth instruction requested by defendant, because it excluded the elements of "comfort, protection, and society" from the consideration of the jury. * * *

It is a difficult matter to lay down general rules by which to estimate damages in this class of cases. Those which occur to us as being applicable to this case, so far as we can judge from the evidence in the record, are as follows: In estimating the pecuniary loss sustained by the widow, the jury may properly take into consideration her loss of the comfort, protection, and society of the husband in the light of all the evidence in the case relating to the character, habits, and conduct of the husband as husband, and to the marital relations between the parties at the time of and prior to his death; and they may also consider his services in assisting her in the care of the family, if any; but the widow is not entitled to recover for her mental anxiety or distress over the death of her husband, nor for his mental or physical suffering from the result of the injury. She is also entitled to recover reasonable

compensation for the loss of support which her husband was legally bound to give her, based upon his probable future earnings and other acquisitions, and the station or condition in society which he would probably have occupied according to his past history in that respect, and his reasonable expectations in the future; his earnings and acquisitions to be estimated upon the basis of the deceased's age, health, business capacity, habits, experience, energy, and his present and future prospects for business success at the time of his death,—all these elements to be based upon the joint lives of herself and husband. She is also entitled to compensation for loss of whatever she might reasonably have expected to receive in the way of dower or legacies from her husband's estate, in case her life expectancy be greater than his. The sum total of all these elements to be reduced to a money value, and its present worth to be given as damages. * * * Within these limits the jury exercise a reasonable discretion as to the amount to be awarded, based upon the facts in evidence and the knowledge and experience possessed by them in relation to matters of common knowledge and information. * * *

The ninth instruction for plaintiff was erroneous, because it authorized the jury to give as damages the value of the life of the deceased, and gave them too much discretion in estimating the damages. *Duval v. Hunt*, 34 Fla. 85, 15 South. 876. Her recovery is not the value of the deceased's life generally, but the value of that life to her, or the loss sustained by her from the premature death of the deceased, as shown by the proofs. The judgment is reversed, and a new trial granted.

II. Exemplary Damages³

ATCHISON, T. & S. F. RY. CO. v. TOWNSEND.

(Supreme Court of Kansas, 1905. 71 Kan. 524, 81 Pac. 205.)

JOHNSTON, C. J.⁴ This was an action by George W. Townsend to recover damages from the Atchison, Topeka & Santa Fé Railway Company for the wrongful death of his wife, occasioned, as he alleges, by the culpable negligence of the railway company. * * * Townsend recovered \$3,850, and \$1,000 of this amount was exemplary damages.

It is first contended that, under section 422 of the Code, Townsend was not entitled to recover damages for the wrongful death

³ For discussion of principles, see *Hale on Damages* (2d Ed.) § 133.

⁴ Part of the opinion is omitted.

of his wife. It provides that "the damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." It is insisted that a husband is not "next of kin" of his wife, and that kinship means relationship by blood, and not by marriage. The reference in the section itself to the statute of descents and distributions furnishes the rule for interpreting the phrase "next of kin." Under that statute the husband and wife inherit from each other, and it has already been held, in *Railway Co. v. Ryan*, 62 Kan. 682; 64 Pac. 603, that the phrase as used in the statute for the recovery of damages for wrongfully causing a death, means those kin who inherit from the deceased under the statute of descents and distributions. * * *

The court advised the jury that punitive damages might be allowed in the case if the jury found that the company was guilty of negligence of a gross, reckless, and willful character, and the findings disclose that such damages were awarded to the extent of \$1,000. Assuming that the negligence was gross and wanton, it is the opinion of the court that exemplary damages may not be allowed in such cases. Recoveries for wrongful death could not be had under the common law. The right to maintain such actions is given by statute, and damages can only be recovered to the extent which the statute allows. There is a division of judicial opinion on the subject of the allowance of exemplary damages for injuries resulting in death, but in 13 Cyc. 365, where the cases are collected, it is said that "the rule is well established that, under statutes giving a right of action for death by wrongful act, exemplary or punitive damages cannot be recovered, unless expressly provided for in the statute giving the right of action." Our statute provides: "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." Civ. Code, § 422.

It will be observed that no reference is made to damages by way of punishment and the limitation placed upon the amount of recovery is somewhat inconsistent with the allowance of exemplary damages. No more than \$10,000 can be recovered for the wrongful death of any person, and if the pecuniary loss of the plaintiff equaled that sum, and that amount was awarded, of course no exemplary damages could be given. The precise point, although considered in a number of cases, has not been expressly decided.

The question was suggested in *Railway Co. v. Cutter*, 19 Kan. 83, but the court, finding it unnecessary for the determination of the case expressly declined to decide it. The character of the damages recoverable in this class of cases was considered in *Railway Co. v. Brown*, 26 Kan. 458, where it was said: "We cannot agree that the theory of the law is to punish for the mere negligent destruction of life, and the law of compensation means that no more should be given to the next of kin than they probably would have received from the decedent if his life had not been taken away." * * * In *Railway Co. v. Ryan*, 62 Kan. 687, 64 Pac. 604, the nature of the action was under discussion, and it was said: "An action of the character of this one is purely compensatory. It is brought to recover for pecuniary loss consequent upon the death."

Although the allowance of exemplary damages was not directly drawn in question in the cases cited the view taken by the court as to the nature of the action indicates quite clearly that nothing can be allowed by way of solatium or as punishment. In most of the states the courts have declined to allow exemplary damages. For instance, they have been rejected in Minnesota, Oregon, Indiana, New York, Michigan, South Carolina, Wisconsin, Iowa, Georgia, Pennsylvania, Illinois, North Dakota, South Dakota, California, Maine, Washington, Texas, Colorado, Alabama, and Ohio. Such damages have been allowed in the states of Connecticut, Colorado (under an early statute), Alabama (under a "homicide act"), Kentucky, Virginia, West Virginia, Tennessee, Missouri, Washington, Texas, and South Carolina. Exemplary damages were allowed in Colorado under a statute giving damages in general terms but, on a slight modification of the statute, the court refused to allow exemplary damages. *Moffatt v. Tenney*, 17 Colo. 189, 30 Pac. 348. In the state of Alabama, under "An act to prevent homicides," the damages recoverable were treated as entirely punitive, and hence exemplary damages were awarded. But under the "employer's act," giving damages for the injuries resulting from the death of employes, it was held that exemplary damages could not be recovered. *Railroad Co. v. Orr*, 91 Ala. 548, 8 South. 360; *Railway Co. v. Trammell*, 93 Ala. 350, 9 South. 870. In Kentucky (one of the states in which such damages are allowed) it is expressly provided in the statute that punitive damages may be recovered. The same is true of Washington and New Mexico. In Texas, under a statute providing in general terms that damages might be allowed, exemplary damages were refused; but, under a recent constitutional provision, exemplary damages are expressly authorized. Under a general statute of South Carolina giving damages, the courts declined to allow exemplary damages. *Garrick v. Railroad Co.*, 53 S. C. 448, 31 S. E. 334, 69 Am. St. Rep. 874; *Nohrden v. Railway Co.*, 54 S. C. 492, 32 S. E. 524. But the Legislature of that state recently amended the law so as to authorize

exemplary damages. In the states of California and South Dakota exemplary damages were expressly given by statute, but since that time the statutes have been changed, eliminating that kind of damages. *Lange v. Schoettler*, 115 Cal. 388, 47 Pac. 139; *Smith v. Railroad Co.*, 6 S. D. 583, 62 N. W. 967, 28 L. R. A. 573.

Washington is classed among the states which allow exemplary damages, and while the statutory provision that "damages, pecuniary or exemplary, as under all circumstances of the case may seem just," are permitted, yet the court held in *Walker v. McNeill*, 17 Wash. 582, 50 Pac. 518, that the recovery was limited to pecuniary damages. In the early case of *Spokane, etc., Co. v. Hoefer*, 2 Wash. 45, 25 Pac. 1072, 11 L. R. A. 689, 26 Am. St. Rep. 842, the doctrine of exemplary damages was held to be unsound in principle. Under a section of a statute of that state providing that the father may maintain an action for the injury or death of a child, it was held that exemplary damages could not be recovered. *Atrops v. Costello*, 8 Wash. 149, 35 Pac. 620. It thus appears that, with a few exceptions, exemplary damages are not allowed, unless expressly provided for by Constitution or statute. In some courts the holding is based to some extent upon the peculiar language of the statute giving damages, but generally it is placed on the nature of this new statutory right of action. Until the statute was passed, no one could recover for the death of a relative. The first statute, known as "Lord Campbell's Act," was the pattern upon which the American statutes were framed. It was early decided in England that the relatives of the deceased could not claim any damages which might have been claimed by the person injured if death had not resulted, but could only obtain compensation for the pecuniary loss which they sustained in his death. This theory, it was held, excluded damages for the pain and suffering of the deceased, or for the mental anguish or distress of his relatives, or for the loss to them of the society of the deceased, and, the damages being simply compensatory, that they necessarily excluded punitive damages.

In adopting the statute, most of the jurisdictions have adopted the interpretation which the courts had given to it, and from the earliest cases this court has held that the damages recoverable were for the pecuniary loss sustained by the next of kin of the deceased. This theory necessarily excludes any award as solatium for the next of kin, or as punishment for the defendant. It follows that the judgment must be modified by striking out the award for exemplary damages, and in all other respects it will be affirmed.

III. No Damages for Injury to Deceased⁵

DWYER v. CHICAGO, ST. P., M. & O. RY. CO.

(Supreme Court of Iowa, 1892. 84 Iowa, 479, 51 N. W. 244, 35 Am. St. Rep. 322.)

Action for personal injury. Judgment for plaintiff, and the defendant appealed.

GRANGER, J.⁶ The plaintiff is the administrator of the estate of Ann Dwyer, deceased, who was on the 9th day of July, 1889, struck by defendant's cars, as a result of which she died about 30 days thereafter. The petition specifies the injuries sustained, and adds: "All of which caused her great pain and suffering for a period of about thirty days, when she died from such injuries." A motion to strike out the words as to pain and suffering was overruled, and the court instructed the jury that, if it found for plaintiff, to allow a "reasonable compensation for pain and suffering." The jury returned a general verdict for plaintiff for \$3,000, and specially found that \$2,300 of the amount was for "pain and suffering," and \$700 "as damages to the estate." An assignment brings in question the correctness of the court's action in permitting the jury to consider pain and suffering as an element of damage. The action was commenced after the death of plaintiff's intestate. If the action had been commenced in her life-time, it is unquestioned that pain and suffering caused by the injury would have been a proper element of damage; and this would be true if, after the commencement of the action, she had died, and her administrator had been substituted as party plaintiff, and prosecuted the suit to judgment. *Muldowney v. Railway Co.*, 36 Iowa, 462.

We come, then, to the important inquiry if such damages are permissible in such a case, where the action is commenced by the administrator. The only authority for maintaining such an action by the legal representative is by virtue of the statute. At the common law, the cause of action abated with the death of the injured party. The law authorizing the action is found in Code, § 2525. "All causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same." We are cited to no case, in this or any other state, where the rule contended for by appellee, and allowed by the district court, has been sustained. It is claimed, however, that the reason for this, as to other states, is because of the peculiarity of the statutes under which such actions are permitted to survive. In sev-

⁵ For discussion of principles, see *Hale on Damages* (2d Ed.) § 131.

⁶ Part of the opinion is omitted.

eral cases this court has expressed its view as to the measure of damages in such cases, and in such a way that appellant regards the law on this point as settled in its favor, while appellee regards the language thus relied upon as merely incidental to other points determined, and in no way decisive of the question now before us. It is true that the precise question now before us was not involved for determination in any of the Iowa cases cited, and the language relied upon by appellant has been used incidentally in the discussion of other questions; but it is not to be understood, because of this, that such language is without value in our deliberations on this question: for much of the language so used is in regard to questions so allied to this in its legal significance as to make them determinable upon quite similar considerations. For instance, the rule as to the measure of damage in cases of this kind has been considered, and, with the point before us in view, a rule excluding such damage has been adopted.

In *Rose v. Railway Co.*, 39 Iowa, 246, it is said: "The action is brought by the administrator for the injury to the estate of the deceased sustained in his death. There is therefore no basis for damage for pain and suffering. * * * Compensation for the pecuniary loss to his estate is alone to be allowed." See, also, *Donaldson v. Railway Co.*, 18 Iowa, at page 290, 87 Am. Dec. 391, and *Muldowney v. Railway Co.*, 36 Iowa, at page 468. In the latter case the action was commenced by the injured party, who died pending the suit, and his administrator was substituted; and it was held that pain and suffering were proper elements of damage because of the action having been commenced by the injured party; but the court guards the rule by saying: "A different rule would obtain if the action had been commenced after his death." It is thought that the expression may be accounted for on the theory that the case was determined under a different statute. Rev. St. § 3467, under which the action arose, is as follows: "No cause of action ex delicto dies with either or both of the parties, but the prosecution thereof may be commenced or continued by or against their personal representatives."

With reference to the particular matter under consideration, it is difficult to trace a distinction between the statutes. The one says, in effect, that such causes of action shall survive the party, and the other that it does not die with the party. The effect of each is to create a survival, and the one, as plainly as the other, contemplates the existence of the cause of action before the death. It is not the effect of either, as seems to be thought by appellee, to create a cause of action because of the death. The statutes deal with the "cause of action," and not with the rule of damage to be applied. In fixing the damage, we look to the wrong to be remedied; to the injury to be repaired. If the action is brought by the injured party, the law attempts to remedy the wrong to him

—not specifically to his estate—and that may include loss of property, time, and that bodily ease and comfort to which he is entitled as against the wrong-doers. If the action is brought to repair an injury to his estate, the law looks, in fixing the rule of damage, to how the estate is affected by the act, and attempts to repair the injury. Loss of time and expenses paid, as a result of the wrong, presumably lessen the estate; but bodily pain and suffering in no manner affect it. It is an item of damage peculiar to the person, and not to pecuniary or property rights. Under our statute, these damages belong “to the estate of the deceased.” *Codé*, § 2526. This distinction is maintained throughout all the cases and authorities that have come to our notice. This court has repeatedly said that these actions are for “injury to the estate.” See cases cited *supra*: *Rose v. Railway Co.*, *Donaldson v. Railway Co.*, *Muldowney v. Railway Co.* Mr. Sutherland, in his work on Damages (volume 3, p. 282), speaking in general of these statutes of survival of actions, says: “The measure of damages is not the loss or suffering of the deceased, but the injury resulting from his death to his family.”

It is only for pecuniary injuries that this statutory right of action is given. Although it can be maintained only in cases in which an action could have been brought by the deceased if he had survived, damages are given on different principles and for different causes. Neither the pain and suffering of the deceased, nor the grief and wounded feelings of his surviving relatives, can be taken into account in the estimate of damages.” In *Railway Co. v. Barron*, 5 Wall. 90, 18 L. Ed. 591, a like case, it is said, speaking of the wife or next of kin, who, under the Illinois statutes are the beneficiaries in such a case: “They are confined to the pecuniary injuries resulting to the wife and next of kin; whereas if the deceased had survived, a wider range of inquiry would have been admitted. It would have embraced personal suffering as well as pecuniary loss, and there would have been no fixed limitation as to the amount.” The language of the Illinois statute is different in phraseology from ours, but not to the extent of inducing a different rule in this respect. Under the statute of Minnesota, so similar to ours as to justify the same rule as to these damages, it is held that “no compensation can be given * * * for the pain and suffering of the deceased.” *Hutchins v. Railway Co.*, 44 Minn. 5, 46 N. W. 79.

We conclude, without doubt, that the district court erred in its ruling on the motion and the instruction to the jury. * * *

The cause is remanded to the district court, with instructions to deduct from the judgment entered the \$2,300 allowed for pain and suffering, and give judgment for the balance. Modified and affirmed.

IV. Prospective Pecuniary Losses—Prospective Benefits⁷

McKAY v. NEW ENGLAND DREDGING CO.

(Supreme Judicial Court of Maine, 1899. 92 Me. 454, 43 Atl. 29.)

This was an action brought by John McKay, as administrator, against the New England Dredging Company, to recover damages for the loss of the life of his intestate by reason of the alleged negligence of the defendant corporation. The action is brought, under the provisions of chapter 124 of the Public Laws of 1891, for the benefit of the father and mother; they being the sole heirs of the intestate. The verdict was for the plaintiff for \$2,000.

At the conclusion of the charge of the presiding justice, counsel for the defendant requested the following instruction to the jury, which was refused: "That, the plaintiff not having proved facts and circumstances sufficient to enable the jury to return a verdict which would approximate reasonable certainty, the plaintiff is entitled to recover only nominal damages." To the refusal to so instruct the jury, the defendant brings exceptions.

EMERY, J. The jury found that the death of the plaintiff's intestate, William McKay, was "caused by the wrongful act, neglect, or default" of the defendant, according to the act of 1891, c. 124. This finding does not seem to us so unmistakably wrong as to require us to set it aside.

The question of the amount of damages to be recovered requires more consideration. The action is "for the exclusive benefit," not of the estate, but of the father and mother of the deceased; they being his only heirs, he having left no widow nor children. The father and mother are entitled to "a fair and just compensation, not exceeding five thousand dollars, with reference to the pecuniary injuries resulting to them from such death."

The right to any compensation is wholly created by the statute, and the amount of the compensation is to be measured solely by the standard prescribed by the statute. At common law, in cases like this, there was no right of action in the widow, children, or heirs for any compensation. Our statute is evidently derived from the English statute of 9 & 10 Vict. c. 93 [1846], known as "Lord Campbell's Act," as were similar statutes in others of the United States and the Canadian provinces. By some writers it has been suggested that these statutes are a reappearance of the ancient *weregild*—the compensation paid by a slayer to the family or clan of the person slain. This, however, is purely fanciful. The stat-

⁷ For discussion of principles, see Hale on Damages (2d Ed.) § 140.

ute is to be construed as a new statute, creating a new right, and not as affirming or reviving an ancient right.

As to the measure of damages under the statute, several propositions are already well established and familiar. No punitive damages can be recovered, nor any damages by way of penalty. No damages can be recovered for any suffering by, nor injury to, the deceased himself, or his estate. His creditors cannot be heard to complain that his estate has been diminished to their injury, nor that they have lost the chance that he would have earned something with which to pay them. No damages can be recovered for any grief, distress of mind, loss of mere companionship or society, or injury to the affections, suffered by the beneficiaries. Nor can damages be recovered for the value of the life to the deceased, to the state, or to the community. The injury for which damages can be recovered must be wholly to the beneficiaries themselves, and it is limited to the pecuniary effect of the death upon them.

It does not follow, however, that the death must cause an actual subtraction from the estate or income of the beneficiaries, or from their earning power. It is not necessary that the beneficiaries should have any legal claim against or upon the deceased. They have no rights, under the statute, as creditors. In every person's life are matters of actual value to him, which form no part of his estate, and have no market value. The education and training which children may reasonably expect to receive from a parent are of actual and commercial value to them, as better fitting them to obtain an income or estate. The loss of that education and training through the death of the parent from the fault of a defendant would be, in the statute sense, a pecuniary injury. So, the attentions and kindness of children to parents, though adding nothing to their estate, may add much to the physical comfort or ease of their life, independent of the affections or of the joy of companionship. The loss of these might, under some circumstances, be a pecuniary injury.

Of course, loss of income or loss of estate would be pecuniary injuries. So would be the loss of a reasonable prospect of additional income and estate in the future. If a son had settled an annuity during his own life upon his parents, his death would be a pecuniary loss to them, as well as to his wife and minor children.

Generally, where there exists a reasonable probability of pecuniary benefit to one from the continuing life of another, whether arising from legal or family relations, the untimely extinction of that life is a pecuniary injury.

It is evident that the pecuniary damages to be recovered under this statute can never be ascertained with exactness, nor with any satisfactory degree of approximation. Unlike ordinary questions of the legal measure of damages, this relates wholly to the future. There can never be knowledge. The conclusion arrived at must

be based on probabilities instead of facts. The only facts that can be ascertained are those which occurred before or at the time of the death. From that data, what would probably have occurred, had not the wrongful act or neglect of the defendant intervened, must be conjectured as carefully as possible. The circumstances of the deceased and the beneficiaries are to be ascertained. The legal family, or other ties are to be considered. The age, capacity, health, means, occupation, temperament, habits and disposition of the deceased and of the beneficiaries are material to be known. There is some probability that these various circumstances shown to be existing at the time of the death would have continued in more or less degree had not the death occurred. They would be subject, however, to acceleration, retardation, interruption, and even extinction, by other circumstances, which may possibly or probably, or even surely, occur after the death. These inevitable, probable, and even possible subsequent circumstances are therefore to be looked for and considered. Whatever result is arrived at must be reached from a careful balancing of the various probabilities.

It remains to make the conjecture, to balance the probabilities, for this case. At the time of the death of William McKay, his father and mother were past middle life. The mother had been an invalid for some six years, unable to do any work or to walk, and for some time had been unable to feed herself. The father was somewhat infirm from rheumatism, being at times unable to work. They were too poor to employ a nurse, and the mother was cared for by the father and the two younger sons, aged 15 and 17. The deceased son was aged $23\frac{1}{2}$ years at the time of his death. He had learned the stonecutter's trade during his minority. After arriving at his majority, he worked at his trade for the most of his time in Quincy, the home of his parents, and turned all of his earnings into their home. He also worked at his trade for a little time at Hallowell and at Leadbetter's Island, and occasionally sent home little sums of money to his mother. He did not have constant employment, but does not appear to have been lazy or unusually idle. He sought at various places for work at his trade, and, failing to obtain that, he worked as a laborer in the defendant's quarry, where he was killed. It is not shown that he sent home any money while in defendant's employ. His wages as laborer were 15 cents an hour, out of which he had to pay his board of \$20 per month. What wages he got at his trade was not shown, but the father at the same trade was paid \$2 per day. The only home the deceased had was with his parents, in Quincy, to which he seems to have returned in the intervals of employment, and paid his board there.

He was of some pecuniary assistance to his parents, though evidently quite small. He rendered this assistance after he became of age. In view of the increasing age and infirmity of his parents,

there is a probability that he would have continued to furnish more or less money or service during their lives, according to their needs. When at home with them, it is probable he would have aided in the care of his invalid mother, and otherwise have aided his parents by personal services. True, he might not. He might have died; might have become sick, crippled, or dissipated, and a burden rather than a help to his parents. He might have married, and this marriage, while it might have brought to the parents the service and attention of a daughter, might, on the other hand, have absorbed all his earnings. The parents themselves might have died the next day. Still, he had a regular expectancy of life, and so had they. There was a probability that things, for a while, at least, would continue somewhat as they were,—that marriage, even, would not end his assistance to his parents.

In fine, parents in their condition would be accounted more fortunate, pecuniarily, with such a son alive than with him dead. So far as their condition was made less fortunate, pecuniarily, by the wrongful act or default of the defendant, they are entitled to recover enough damages to make them "a fair and just compensation." Such damages would evidently be more than nominal, and hence the defendant's contention on this point cannot be sustained.

The jury assessed the damages at \$2,000. This is manifestly disproportionate and extravagant. Assuming the parents to have been 45 years old (there being no direct statement of their age in the evidence), \$2,000 would procure them an annuity of nearly \$140 during the life of the survivor. It is not at all probable that the deceased would have averaged that much each year in contributions of money and services. His employment was not at all constant. He had to go about seeking employment, and at the time of his death was working as laborer at 15 cents an hour. His expenses for board at that time were \$20 per month. His yearly margin over expenses would probably not have been over \$100, at the most. It is not to be expected, however, that he would limit himself to absolutely necessary expenses, and send the surplus to the parents. It would be natural, and therefore probable, that he would give himself some indulgences, especially as there were two other nearly grown sons with his parents.

In fine, we think that \$70 per year would be the extent of any probability of his contribution in money and services during the lives of his parents. To produce that sum as annuity for a person at the age of 45 would require somewhat less than \$1,000. The chance that he would have accumulated an estate which his parents would live to inherit is too remote for consideration.

But it would not be accurate nor just to assume that the parents would receive the value of \$70 per year with the regularity and certainty of an annuity from a responsible annuity company. There

were many contingencies threatening even that sum. Industrial changes might throw him out of employment at his trade, and reduce him to a mere laborer. He might die from other causes, or become sick or dissipated. He might marry, and have to struggle to support a family of his own, or he might weary of well-doing for his parents, and practically cease caring for them any further, however well able to do so. Other contingencies might also be suggested.

Figuring upon all the probabilities, it seems to us that a comparatively small sum would be "a fair and just compensation" for the pecuniary injury to the parents. But the amount of such compensation is not for us to determine. The statute makes the jury the judges of that amount, and we must, and do, yield much respect to their judgment. We cannot cut down their award to what seems to us fair and just. We can only cut it down to a sum which we think reasonable, unbiased men will concede to be sufficient,—to a sum, more than which would be manifestly excessive. After much reflection and conference, we fix that sum at \$750, though a minority think that too much. The plaintiff must accept that amount, or submit to a new trial.

New trial granted unless plaintiff will remit all above \$750 within 30 days after filing of the rescript.

V. Same—Prospective Inheritance⁸

DEMAREST et al. v. LITTLE.

(Supreme Court of New Jersey, 1885. 47 N. J. Law, 28.)

MAGIE, J.⁹ This action was brought to recover damages for the death of plaintiff's testator. * * * The case was first tried in 1883, and a verdict rendered for plaintiffs, assessing their damages at \$30,000. This verdict was afterwards set aside upon a rule to show cause. * * * The case has been again tried, and the verdict has been again rendered for plaintiffs, assessing their damages at \$27,500. * * *

The action is created by statute, which supplies the sole measure of the damages recoverable therein. They are to be determined exclusively by reference to the pecuniary injury resulting to the widow and next of kin of deceased by his death. The injury to be thus recovered for has been defined by this court to be "the depriva-

⁸ For discussion of principles, see Hale on Damages (2d Ed.) § 141.

⁹ Part of the opinion is omitted.

tion of a reasonable expectation of a pecuniary advantage which would have resulted by a continuance of the life of deceased." *Paulmier v. Railroad Co.*, 34 N. J. Law, 151. Compensation for such deprivation is therefore the sole measure of damage in such cases. * * *

Deceased left no widow, and but three children. All of them had reached maturity. Two sons were self-supporting; the daughter was married. He owed no present duty of support, and there is nothing to show any fixed allowance or even casual benefactions to them. They are therefore deprived of no immediate pecuniary advantage derivable from him. At his death he was in business, in partnership with his sons and son-in-law. All the partners gave attention to the business and the capital was furnished by deceased. His death dissolved the partnership and deprived the surviving partners of such benefit as they had derived from his credit, capital, skill and reputation. But the injury thus resulting is not within the scope of this statute, which gives damages for injuries resulting from the severance of a relation of kinship and not of contract. No damages could be awarded on that ground.

Defendants strenuously urge that, outside of the partnership or in the event of its dissolution, the next of kin had a reasonable expectation of deriving from the parental relation an advantage by way of services rendered or counsel given by deceased in their affairs. A claim of this sort must be carefully restricted within the limits of the statute. The counsels of a father may in a moral point of view, be of inestimable value. The confidential intercourse between parent and child may be prized beyond measure, and its deprivation may be productive of the keenest pain. But the legislature has not seen fit to permit recovery for such injuries. It has restricted recovery to the pecuniary injury; that is, the loss of something having pecuniary value.

Now, it may with some reason be anticipated that a father, out of love and affection, might, if circumstances rendered it proper, perform gratuitous service for a child, which by rendering unnecessary the employment of a paid servant, would be of pecuniary value, and that he might, by advice in respect to business affairs, be of a possible pecuniary benefit. But whether such an anticipation is reasonable or not must depend on the circumstances. Considering the age, the assured position, the business and other relations of these children, it is obvious that the probability of any pecuniary advantage to accrue to them in these modes was very small. Indeed, it would not be too much to say that resort must be had to speculation to discover any such advantage. At all events, compensation for this injury in this case could not exceed a small sum without being excessive.

The principal basis for plaintiff's claim is obviously this: That the death of deceased put an end to accumulations which he might

have thereafter made and which might have come to the next of kin. Deceased had accumulated about \$70,000, all of which, except \$10,000 capital invested in the business, seems to have been placed in real estate and securities as if for permanent investment. By his will the bulk of his property was given to his children. At his death he had no other sources of income than his investments and his business.

In determining the probability of accumulations by deceased if he had continued in life, no account should be taken of the income derivable from his investments. These have come in bulk to the children, who may, if they choose, accumulate such income. A deprivation of the probability of his accumulating therefrom is no pecuniary injury. On the contrary, it is rather a benefit to them to receive at once the whole fund in lieu of the mere contingency or probability of receiving it, though with its accumulations (at best uncertain), in the future. Indeed, the benefit thus accruing to the next of kin in receiving at once this whole property, in the view of one of the court, is at least equivalent to the present value of the probability of their receiving it hereafter, if deceased had continued in life, with all his probable future accumulations from any source whatever, in which case it is evident that his death has not resulted in any pecuniary injury to them. But without adopting this view of the evidence, it is plain that in determining probable future accumulations attention should be restricted to such as would arise from the labor of deceased in his business. His receipts from the business for the two years it had been conducted were proved. What he expected was not proved, but left to be inferred from his mode of life. At death he was about fifty-six and a half years old, and by the proofs had an expectation of life of sixteen and seven-tenths years.

From these facts the jury were to find what deceased would probably have accumulated, what probability there was that his next of kin would have received his accumulations, and then what sum in hand would compensate them for being deprived of that probability. In what manner the jury attempted to solve this problem we cannot ascertain. Plaintiffs' counsel attempts to show the correctness of the result reached, by calculation. He assumes the income of deceased from his business during the last year as the annual income likely to be obtained, and deducts only \$1,000 each year as the probable expenditure of deceased, and then finds the present worth of the net income so determined for the deceased's expectation of life is \$27,710.32.

This calculation tests the propriety of this verdict, and in my judgment conclusively shows that it was rather the result of sympathy or prejudice than a fair deduction from the evidence. For, assuming the amount attributable to the loss of deceased's services was but small (and if more it was excessive), the award

of the jury on this account was but a few hundred dollars less than the present worth of the full net income if received for his full expectancy of life. To reach such a result the jury must have found every one of the following contingencies in favor of the next of kin, viz.: That deceased, who had already acquired a competence, would have continued in the toil of business for his full expectancy of life; that he would have retained sufficient health of body and vigor of mind to enable him to do so, and as successfully as before; that he would have been able to avoid the losses incident to business, and would have safely invested his accumulations; and that the next of kin would have received such accumulations at his death. A verdict which attributes no more weight than this has, to the probability that one or more of all these contingencies would happen, cannot have proceeded from a fair consideration of the case made by the evidence. * * *

DENVER & R. G. R. CO. v. SPENCER.

(Supreme Court of Colorado, 1900. 27 Colo. 313, 61 Pac. 606, 51 L. R. A. 121.)

Action by Henry C. Spencer and others against the Denver & Rio Grande Railroad Company to recover damages for the death of their father, caused by the alleged negligence of the railroad company. From a judgment for plaintiffs, the defendant appeals.

GABBERT, J.¹⁰ * * * The final question relates to the amount of damages assessed by the jury. The verdict was in the sum of \$4,000, which appellant contends is excessive. The right of appellees to maintain this action is purely statutory. It did not exist at common law. The damages which they are entitled to recover must be limited to those of a compensatory character—in other words, to such pecuniary damages as they have sustained by reason of the death of their father. As aptly stated by the late Justice Elliott in *Pierce v. Conners*, 20 Colo. 178, 37 Pac. 721, 46 Am. St. Rep. 279: "The true measure of compensatory relief in an action of this kind, under the act of 1877, is a sum equal to the net pecuniary benefit which plaintiff might reasonably have expected to receive from the deceased in case his life had not been terminated by the wrongful act, neglect, or default of defendant; * * * but it must be borne in mind that the recovery allowable is in no sense a solatium for the grief of the living, occasioned by the death of the relative or friend, however dear. It is only for the pecuniary loss resulting to the living party entitled to sue, resulting from the death of the deceased, that the statute affords compensation. This may seem cold and mercenary, but it is unquestionably the law."

At the time of his death his wife was living, and survived him

¹⁰ Part of the opinion is omitted and the statement of facts is rewritten.

about two years. The appellees were in no manner dependent upon him for support. The mere relationship between them and deceased cannot be made the basis of a recovery in this case, however much they may have grieved over his untimely death. Therefore, as stated in the former opinion in this case, "the pecuniary loss, if any, that resulted to them by reason of the death, was in being deprived of their share of the money that he might accumulate during his expectancy of life." Or, under the evidence, their recovery must be limited to the sum which the father, by his personal exertions, less his necessary personal expenses, and those of his wife during her life, would have added to his estate, and which would have descended to the appellees, as his heirs at law. The court so instructed the jury. Was this instruction followed?

At the time of his death, deceased was upward of 68 years of age. His expectancy of life was about $9\frac{1}{2}$ years. There is testimony to the effect that at the time of his death his annual income, arising from his personal exertions, after deducting his personal expenses, equaled the sum of about \$1,000 per annum, although the evidence is not entirely satisfactory upon this point, for the reason that the witness testifying on this subject was not certain that he was fully advised regarding the personal expenditures of the father. The money earned by deceased from this source consisted of a salary of \$1,500 per annum as an employé of a bank, and about \$500 more per annum, earned as a conveyancer and notary, in connection with his bank duties. He had considerable income from investments, but this cannot be considered, in estimating his annual savings. We mention this, however, because it appears that his net worth at the time of his death could not have been so very much in excess of the value of his bank stock, which was \$6,400, because it appears that his other investments were incumbered in such an amount that, after deducting interest, there was but little left in the way of income from these sources, after payment of taxes. Had he lived the full term of his expectancy, and during that period been able at all times to continue to engage in the work in which he was employed at the time of his death, his net personal earnings would have exceeded much more than the damages awarded. It cannot be fairly assumed, however, or expected, that, at his advanced age, he would have continued to labor during all the future years of his life.

In considering this question, account should be taken of his liability to illness, his incapability of further exertions by reason of age, and that he might, on account of his years, conclude to retire from active work; that, in all probability, his age would soon incapacitate him from discharging his duties as an employé in the bank, in which he was engaged; that, if he did continue to earn money for a portion of his expectancy of life, he would at least expend a part so earned for personal use during the remaining years.

All these are contingencies which must be considered. Necessarily, the ascertainment of damages, dependent upon a variety of circumstances and future contingencies, is difficult of exact computation; but, nevertheless, they cannot be presumed and arbitrarily given. Undoubtedly much latitude must be given a jury in cases of this character, but there must be some basis of facts upon which to predicate a finding of substantial pecuniary loss. *Diebold v. Sharpe*, 19 Ind. App. 474, 49 N. E. 837. Except for the statute, appellees could not maintain this action. Its provisions are beneficent, but limited. In no case under it can damages exceed the sum of \$5,000.

Taking into consideration the evidence upon which the award of damages is based in this case, the contingencies to which we have directed attention, the improbability that deceased, during the remaining years of his life, would have saved from net personal earnings a sum anywhere nearly approximating the damages awarded, and the disproportion of that sum to his previous accumulations, it is evident that the jurors certainly failed to consider the instructions of the court on the subject of damages, but must have been influenced by considerations other than those which the law recognizes as elements of damages in such cases. For these reasons, the judgment of the district court is reversed, and the cause remanded for a new trial. Reversed and remanded.

VI. Nominal Damages ¹¹

LAZELLE v. TOWN OF NEWFANE.

(Supreme Court of Vermont, 1898. 70 Vt. 440, 41 Atl. 511.)

Case by L. Z. Lazelle against the town of Newfane, under V. S. § 2452, for damages to next of kin resulting from the death of plaintiff's intestate, caused by an insufficiency in defendant's highway. Judgment for defendant, and plaintiff excepted.

The plaintiff excepted to the defendant's being permitted to show the amount of property owned by the intestate and the next of kin, respectively, at the time of the former's death; to the failure of the court to charge that the jury might award damages for the loss of the society of the deceased; to the failure to charge that the jury might consider the special damages of the loss of the services of a mother to a son and his family; and to the failure to charge that, if the defendant is primarily liable, the plaintiff is entitled to at least nominal damages. The jury were instructed to return a verdict

¹¹ For discussion of principles, see *Hale on Damages* (2d Ed.) § 147.

for the defendant unless they found that the next of kin had sustained actual damages. They were instructed not to take into consideration any pecuniary benefit which the next of kin had derived from the death of his mother by reason of inheriting her property.

TYLER, J.¹² The plaintiff's evidence tended to show that the intestate was a widow and about 79 years old; that she had suffered an injury to one hip many years before, which made her slightly lame; that she and her only son and child, Stillman H., lived in different tenements in the house situated upon a farm which they owned together; that her son was 52 years old, had a wife, and two children, 9 and 15 years old respectively; that her son and his wife were in good health; that the intestate did her own work, and some work for her son's family, such as sewing and mending, and occasionally, in the absence of her son's wife, got the meals for the family, "and did such other work about her son's household and for his family as a woman of her age, condition of health, and situation would naturally do, situated as the family then was."

1. At common law all actions for personal injuries died with the person injured, and the death of a human being by another's wrongful act, though involving pecuniary loss, afforded no ground for an action for damages in behalf of the widow or next of kin. *Sherman v. Johnson*, 58 Vt. 40, 2 Atl. 707; *Legg v. Britton*, 64 Vt. 652, 24 Atl. 1016. Damages for the death of a person, caused by the wrongful act, neglect, or default of another person or a corporation, are recoverable only by force of the statute. V. S. § 2451. As was said by the court in *Legg v. Britton*: "Strictly, it is a new right of recovery, arising from an injury to the intestate, which gave or would have given him a right of action and of recovery if death had not ensued." Section 2452, in express terms, limits the recovery to the pecuniary injuries resulting from such death, to the wife and next of kin. The first English statute that gave the right to maintain an action for the recovery of damages for the wrongful killing of a human being was enacted in 1846, and is generally known as "Lord Campbell's Act." 9 & 10 Vict. c. 93. Our own statute and the statutes of many of the other American states have provisions similar to those contained in that act. While the statute seems capable of but one construction, it has been several times before the court, and it has been held that pecuniary loss or injury was the limit of recovery. *Needham v. Railway Co.*, 38 Vt. 294; *Eames v. Brattleboro*, 54 Vt. 471; *Legg v. Britton*, *supra*. That, in estimating the damages, the jury are confined to the pecuniary loss sustained by the widow or next of kin, and cannot take into consideration their grief and mental suffering, nor give damages by way of solatium, is well stated in *Railway Co. v. Goodykoontz*, 119 Ind. 111, 21 N.

¹² Part of the opinion is omitted.

E. 472, 12 Am. St. Rep. 371, and is supported by numerous authorities cited in the notes to that case. * * *

But, to enable the jury to properly estimate the pecuniary injury, it is obviously necessary that evidence be given showing the situation and circumstances in life of the deceased, his age, probable duration of life, mental and physical condition, ability and disposition to labor, habits of industry and earning power, and also the amount of his estate as bearing upon the likelihood of his becoming a charge instead of being an assistance if he had lived.

* * * Human lives are not of equal pecuniary value, and the value of services rendered depends upon the wants of the beneficiary. Therefore it is competent to show the situation of the persons who claim to have been so injured, and the occasion for and value to them of the services of the deceased. The death of the father of young children who required his care and training would be a greater pecuniary loss to them than the death of a father would be who had become almost wholly dependent upon his children for his maintenance. So, the loss of a husband who maintained and cared for his wife would be a greater pecuniary loss to her than if he were indolent, thriftless, and were supported by her. In *Eames v. Brattleboro*, the presiding judge, in his instructions to the jury, spoke of the next of kin as of tender age, and remarked that, "like all children of that age, they need the care and nurture of a mother, and you as well as any one know how valuable such care is to young children." It has been held that loss of intellectual and moral training and proper nurture by a child, and loss of her husband's care and protection by a widow, are within the meaning of the term "pecuniary loss." *Tilley v. Railway Co.*, 24 N. Y. 471; *Id.*, 29 N. Y. 252, 86 Am. Dec. 297; *McIntyre v. Railway Co.*, 37 N. Y. 287.

In the case at bar the amount of pecuniary assistance which the son might reasonably have expected to receive from his mother if she had lived is the sole ground of recovery; and, in arriving at that amount, the jury should have been guided by the rules above stated. The exceptions concisely state the situation of mother and son with reference to each other; their dependence upon each other, so far as there was mutual dependence; the mother's physical condition, ability, and disposition to perform labor for her son; and his occasion for her services about the work of his house, the care of his children, or otherwise. In view of the pecuniary benefit she would probably have been to him, it was proper to consider the likelihood, at her age and in her condition of health, of her requiring care and expense from her son. This is not an "offset," as the plaintiff's counsel term it, but an estimate of the pecuniary damages in the light of the probabilities of the intestate's continued life, health, and ability to render her son pecuniary assistance. It was clearly admissible, according to the rules above stated, to show

the amount of property possessed respectively by the intestate and her son, as indicating the situation and circumstances of the parties.

The supplemental charge of the court was a concise and accurate statement of the law upon the subject of pecuniary damages, and complied with all the proper requests presented: "In considering the question of damages—the pecuniary damages of Stillman Lazelle, by reason of the death of his mother, if you come to that question—you are to take into consideration the relation of the mother, in her life, to her son, the way they lived there together, her age, her physical and mental condition, the means which she had for her support, the probability as to her future life and condition, what under the circumstances she would be likely to do of pecuniary value to the son, and what under the circumstances or probable circumstances of the future he would be likely, in the ordinary course of events, to do for her, situated as they were, conditioned as they were in all respects as disclosed by the evidence; and the pecuniary damage to him would be the excess of the pecuniary benefit that she was to him over what he had to do for her; that was the pecuniary value to him. You are to consider the mutual relations of the parties, their attitude to each other, and their probable course of conduct, in reference to doing each for the other. Now, in view of all these circumstances, how much, in the light of all the evidence, do you find was the pecuniary loss to him—how much less is he worth in dollars and cents by reason of her death than he would have been had she lived? That is the way it should be figured out." "The relationship and situation of the parties" fully appeared in the evidence, and was properly commented upon by the court. The son's loss of the society of his mother was not an element of recovery, nor does the case show any special or peculiar damages arising from the relation between the intestate and her son.

2. The plaintiff contends that he was entitled to recover at least nominal damages. If death had not ensued, and the intestate would have had a right to maintain an action and recover damages on account of the wrongful act, neglect, or default of the defendant, then, death having ensued, the defendant was liable to this action by the administrator, in behalf of the son, to recover such damages as were just, with reference to the pecuniary injuries resulting to him from such death. In a certain event the defendant is "liable to an action," and in that action the plaintiff may recover damages for the son's pecuniary damages if he has suffered any. But suppose the death of the mother relieved the son from a great burden of care and expense, so that he was pecuniarily benefited, rather than injured; is he still to have nominal damages? We think that is not the construction to be given the statute. On the contrary, the action is given to recover damages only when there have been pecuniary injuries.

We are aware that this construction is not in accordance with the cases cited on the plaintiff's brief, nor with the general current of American authorities. In *Railway Co. v. Shannon*, 43 Ill. 338, under a like statute, it was held that where a person has met with death caused by the wrongful act, neglect, or default of another, whenever there are next of kin, an action will lie for the recovery of at least nominal damages. *City of Chicago v. Scholten*, 73 Ill. 468. The same is held in the New York cases cited; and in *Howard v. Canal Co.* (C. C.) 40 Fed. 195, 6 L. R. A. 75, the court said that, as the plaintiff was entitled to recover, he was entitled to nominal damages at least, and to such further sum as is proved, within the meaning of the statute. *Thomp. Neg.* § 1293, says that in the United States, in such a case, nominal damages may be given, but that in England it is held that, when there is no proof of actual damages, even nominal damages are not allowed. Some of the authorities that state that nominal damages are recoverable do not distinguish between actions brought to enforce rights of the deceased and actions brought to enforce rights given by the statute to the next of kin. In *Duckworth v. Johnson*, 4 Hurl. & N. 653, the court said: "The questions are whether a verdict can be entered for the defendant, on the ground that the action cannot be maintained, or the damages reduced to a nominal amount, on the ground that there was a right of action, but that no damage was sustained. My opinion is that, looking at the act of parliament (9 & 10 Vict.), if there was no damage, the action is not maintainable. It appears to me that it was intended by the act to give compensation for damage sustained, and not to enable persons to sue in respect of some imaginary damage and so punish those who are guilty of negligence, by making them pay costs; * * * that an action cannot be maintained by the representative of a deceased person without proof of actual damages to the parties on whose behalf the action is brought. The mere proof, therefore, of the death by negligence, does not entitle the executor or administrator to a verdict for nominal damages." In *Boulter v. Webster*, 11 Law T. R. (N. S.) 598, the same doctrine was held—that there must be special damages, resulting in death from negligence, and that the action could not be supported to recover merely nominal damages. * * *

As damages are recoverable only by force of the statute and as compensation for pecuniary injuries, there is no ground upon which nominal damages can rest. It is a forced construction of the statute to hold that the words, in section 2451, "shall be liable to an action for damages," give an absolute right to recover nominal damages, when upon trial the plaintiff is unable to prove any "pecuniary injuries resulting from such death, to the widow or next of kin," as required by the following section. Judgment affirmed.

WRONGS AFFECTING REAL PROPERTY

I. Injuries to Real Property—Trespasses¹

GILMAN v. BROWN.

(Supreme Court of Wisconsin, 1902. 115 Wis. 1, 91 N. W. 227.)

Trespass by Charles W. Gilman against Orlando Brown for the alleged willful, malicious, and wanton breaking and entering of plaintiff's close, and destroying his fence, shade trees, and shrubberies. There was judgment for plaintiff for \$325, and defendant appeals.

DODGE, J.² * * * The actual damages claimed by plaintiff included destruction of shade and fruit trees, berry bushes, and rhubarb plants. Evidence was admitted to prove the value of such things while in position as parts of the realty, and no evidence was given of the diminished value of the land by reason of their destruction. The defendant on the trial substantially conceded this to be the true rule and method of ascertaining damages, and requested no instruction to the jury for any other rule. He now, however, contends that the only measure of damages to the owner for such injuries is the diminished value of the premises. On this question the views of the courts are not uniform. In New York it has been held in a recent case (*Dwight v. Railroad Co.*, 132 N. Y. 199, 30 N. E. 398, 15 L. R. A. 612, 28 Am. St. Rep. 563) that the only method of measuring compensatory damages from the destruction of fruit and shade trees not valuable after their severance from the property is the lessened value of the land itself. That case is not in accord with some earlier cases in New York, but may perhaps be taken as settling the rule in that state. But a different view has been taken elsewhere, and it has often been held that, while that method was open to a plaintiff suffering from a wrongful trespass, it was also open to him to offer proof of the value of the things destroyed to the real estate for the purposes of occupancy. That view is declared by *Sutherland* to be the better one. 3 *Suth. Dam.* § 1019, citing *Railroad Co. v. Bohannon*, 85 Va. 293, 297, 7 S. E. 236; *Montgomery v. Locke*, 72 Cal. 75, 77, 13 Pac. 401; *Mitchell v. Billingsley*, 17 Ala. 391, 393; *Wallace v. Goodall*, 18 N. H. 439; *Whitbeck v. Railroad Co.*, 36 Barb. (N. Y.) 644; *Folsom v. River Co.*, 41 Wis. 602, 608.

The question has never been fully considered by this court, but

¹ For discussion of principles, see *Hale on Damages* (2d Ed.) §§ 153, 154.

² Part of the opinion is omitted and the statement of facts is rewritten.

in *Andrews v. Youmans*, 82 Wis. 81, 52 N. W. 23, the latter method was adopted and passed without criticism, the judgment being affirmed on appeal. We think such rule the safe and proper one. It must not be forgotten that recovery in trespass is always based upon a wrongful invasion of the plaintiff's rights, and that the rule of damages adopted should be such as to more carefully guard against failure of compensation to the injured party than against possible overcharge upon the wrongdoer. An owner of real estate has a right to enjoy it according to his own taste and wishes, and the arrangement of buildings, shade trees, fruit trees, and the like may be very important to him, may be the result of large expense, and the modification thereof may be an injury to his convenience and comfort in the use of his premises which fairly ought to be substantially compensated, and yet the arrangement so selected by him might be no considerable enhancement of the sale value of the premises, it might not meet the taste of others, and the disturbance of that arrangement, therefore, might not impair the general market value. Hence it is apparent that while the owner may be deprived of something valuable to him, for which he would be willing to pay substantial sums of money or which might have cost him substantial sums, yet he might be wholly unable to prove any considerable damages merely in the form of depreciation of the market value of the land. The owner of property has a right to hold it for his own use as well as to hold it for sale, and if he has elected the former he should be compensated for an injury wrongfully done him in that respect, although that injury might be unappreciable to one holding the same premises for purposes of sale. The case at bar presents an illustration. Amongst the shade trees claimed to have been destroyed was a well-grown willow tree, furnishing shelter from the weather and from the sun's rays. The plaintiff had erected his barn and arranged his barnyards so as to avail himself of this protection, and the defendant himself testified that, while the destruction of that tree would not impair the selling price of the lots, it would substantially interfere with the comfort and convenience of the plaintiff in the use of the barn and in caring for his domestic animals. No error was committed in admitting the proof complained of.

We cannot sustain the appellant's contention that error was committed by submitting the question of punitive damages to the jury. Defendant knew of plaintiff's claim to the land, and there was evidence which, if believed by the jury, fully warranted an inference of such degree of wantonness in the trespass, if not of actual malicious injury, as justifies the imposition of exemplary damages. The question of such damages being in the case, of course proof of defendant's financial condition was proper, as also an instruction that the jury might properly consider it in fixing the amount. * * * Judgment affirmed.

II. Contracts to Sell Real Property—Breach by Vendor³

NEPPACH v. OREGON & C. R. CO.

(Supreme Court of Oregon, 1905. 46 Or. 374, 80 Pac. 482.)

Action by Anthony Neppach against the Oregon & California Railroad Company for breach of contract for the sale of land. The plaintiff had judgment for \$47,000, and defendant appeals.

BEAN, J.* * * * The remaining question involves the competency of evidence given by some of the witnesses as to the value of the timber growing on the land which the defendant contracted and agreed to sell to plaintiff and Himpel, and the proper measure of damages for the breach of the contract. It is the law that the value of real estate cannot be shown by proving the value of the several constituent elements of value, and then adding these together, taking the aggregate amount as the value of the whole. It would manifestly not be proper, as Mr. Justice Cooley remarks, to say that "a thousand timber trees upon it are worth so much, a hill of gravel so much, a deposit of valuable clay so much, and when these are all removed the land is still worth so much for agricultural purposes. Consequently, as it is, it is worth the aggregate of all these sums." Page v. Wells, 37 Mich. 415, 422. Such an estimate of value would be unfair and misleading, and would introduce into the case speculative and uncertain questions, and would detract from the real question involved, which is, what is the market value of the land as it is? A witness called to testify as to the value of land can take into account everything which goes to make up the value, but he must confine his testimony to the market value of the land as a whole, and not to its several parts. A witness, however, who has given an opinion of value, may be asked on his examination in chief to state the grounds of his opinion. 2 Sutherland, Dam. (3d Ed.) § 450; Haslam v. Galena & So. Wis. R. Co., 64 Ill. 353. And this is the rule adopted and adhered to by the trial court.

The court ruled that the value of the land in question could not be ascertained from the estimated stumpage value of the timber growing thereon, but that a witness who had given an opinion as to the market value of the land might state the facts upon which such opinion was based, which in this case involved the character and value of the timber. The witnesses were first asked to give their opinions as to the market value of the land, and, after they

³ For discussion of principles, see Hale on Damages (2d Ed.) § 159.

⁴ Part of the opinion is omitted and the statement of facts is rewritten.

had done so, were permitted to state the amount and value of the stumpage as showing upon what they based their opinions; and this they had a right to do under the law, as we understand it. The court instructed the jury that the measure of damages in this case would be the market value of the land at the time of the breach of the contract, less the amount of the unpaid purchase price.

Mr. Warvelle says, in speaking on the subject of the measure of damages in an action by a vendee against a vendor for the breach of a contract to convey real estate: "The rule is well established that where the vendor has title, and for any reason refuses to convey it, as required by the terms of the agreement, he shall respond in damages, and make good to the vendee whatever he may have lost by reason of the breach. So far as money can do it, the vendee must be placed in the same situation with regard to damages as if the contract had been specifically performed; and the measure of such damages will ordinarily be the difference between the contract price and the value of the property at the time of the breach. This has always been regarded as the true measure of damages in actions on contracts for the future delivery of marketable commodities, and it makes no difference in principle whether the contract be for the sale of real or personal property. In both instances the vendee is entitled to have the thing agreed for at the contract price, and to sell it himself at its increased value, and if it be withheld the vendor should make good to him the difference." 2 Warvelle, Vendors (2d Ed.) § 936. Mr. Sedgwick and Mr. Sutherland lay down the same rule. 3 Sedg. Dam. (8th Ed.) § 1012; 2 Suth. Dam. (3d Ed.) §§ 578, 579. And so are the authorities. 29 Am. & Eng. Enc. Law (2d Ed.) 724.

Where a vendor acting in good faith and without knowledge of a defect in his title agrees to sell and convey land, and is unable to do so because of a failure of title, or if, upon discovery of such defect, he refuses further to perform or to be bound by the contract, leaving the vendee to his action for damages, there is some conflict in the authorities as to whether the vendee can recover anything more than the amount paid, with interest. No such case, however, is presented here. The defendant knew, or was chargeable with knowledge, at the time the contract was made, of the condition of its title, and that the land which it agreed to sell to the plaintiff and Himpel was included in the limits of a prior grant to the Northern Pacific Railroad Company. It did not at any time, attempt to repudiate or rescind the contract on account of the controversy about the title, or decline to be bound further thereby on that account, but, on the contrary, induced the vendees to make an agreement or contract with it for its benefit, and upon which they relied and acted, to postpone performance until the title was settled. It does not plead a want of title as a defense

or in mitigation of damages, but avers that it has selected the lands and filed lists thereof in the local land office, which have been approved, and "has duly complied with the terms of such act of Congress as aforesaid, and is entitled to patents as aforesaid." It therefore, for the purposes of this case and under the pleadings, occupies the same situation as a vendor who has title to land but refuses to convey.

In such case the authorities are that the vendee may recover for the loss of his bargain, and that the measure of damages is the value of the land agreed to be conveyed at the time of the breach, less the amount, if any, of the purchase price unpaid. This was the rule adopted by the trial court. There being no error in the record, the judgment is affirmed.

III. Same—Breach by Vendee⁵

HOGAN v. KYLE.

(Supreme Court of Washington, 1894. 7 Wash. 595, 35 Pac. 399, 38 Am. St. Rep. 910.)

Action by F. V. Hogan against George F. Kyle for breach of contract to buy real estate. There was judgment for plaintiff for the unpaid balance of the purchase price, and defendant appeals.

DUNBAR, C. J.⁶ * * * The judgment in this case will have to be reversed, in any event, for under its terms the respondent recovers the full purchase price, and is allowed to retain the land which represented the purchase price. In this case these are dependent obligations upon which the respondent is suing. When the first installment became due, he could have recovered the amount then due as upon an independent contract; but having elected to wait until the last installment became due, and upon the payment of which defendant would be entitled to a deed, the obligations become dependent. They all relate back to the contract, and appellant cannot sustain an action for either installment without proof of performance or readiness to perform on his part. *McCroskey v. Ladd*, 96 Cal. 455, 31 Pac. 558, and cases cited. In that case the court said: "There is but one single cause of action—one and indivisible. The defendant, if he would maintain his deed, must pay all; and the plaintiff, if he would recover, must show such a performance on his part as would entitle him to all the unpaid consideration." It is not enough that the deed was

⁵ For discussion of principles, see *Hale on Damages* (2d Ed.) § 160.

⁶ Part of the opinion is omitted and the statement of facts rewritten.

tendered at any particular time, but the tender must be kept good so that it may be taken into consideration in the entry of the judgment.

Plaintiff here simply shows that the tender had been made prior to the commencement of the action, and it is therefore insufficient excepting on the theory that the judgment could be rendered independently of the performance of his part of the contract by the vendor, which would result in allowing the vendor to keep both the money and the land. On that proposition we quote from Warvelle on Vendors, (page 961:) "There are cases, both in England and the United States, where, on the vendee's default, the vendor, having offered to perform, has been permitted to recover as damages the whole purchase price. The injustice of such a measure, however, is apparent on its face, for it gives the vendor his land, as well as its value, and is not now regarded as a correct rule in either country." The rule in such cases is that the vendor has a right to the fruits of his bargain, and is entitled to compensation for any loss he may suffer by reason of its nonconsummation. What his damages are, in such circumstances, must be alleged and proven, like any other fact in the case. Under one set of circumstances, the measure of damages might be one thing, and under other circumstances the measure might be governed by an entirely different rule. The land may have deteriorated in value, and his damages would be great, or it might have increased in value, and the damages would be nominal.

As is well argued by the appellant in this case, so far as the complaint reveals, the land may be worth as much or more than it was when the agreement was executed; and the respondent, having received an advance payment, which is forfeited, may actually be benefited. The cases cited in Warvelle fully sustain the announcement in the text, both as to the unfairness of allowing the vendor to retain the land and the money, and as to the measure of damages. In *Railroad Co. v. Evans*, 6 Gray (Mass.) 25, 66 Am. Dec. 394, it was held that, in an action at law by the vendor to recover damages for the breach of a contract for the sale of land, the measure of damages is not the contract price, but the difference between that price and the price for which the land could have been sold at the time of the breach. Under this rule, which seems to us to be an equitable one, and one which is adopted by many courts, the complaint is plainly deficient. * * * Judgment reversed.

BREACH OF MARRIAGE PROMISE

I. Compensatory Damages ¹

OSMUN v. WINTERS.

(Supreme Court of Oregon, 1894. 25 Or. 260, 35 Pac. 250.)

Action by May Osmun against H. D. Winters for breach of promise of marriage. The plaintiff alleged the promise and the breach thereof and seduction by the defendant under the promise. There was verdict and judgment for plaintiff for \$10,500, and defendant appeals.

BEAN, J.² * * * The first question arises upon the following instruction: "This is an action for a breach of promise of marriage, and although there has been a good deal of evidence introduced here bearing upon the question of seduction, which is set up in the pleadings in the case, you must not consider seduction as the principal element in the case. All that can be claimed for or gained by the charge of seduction in these pleadings is an aggravation of damages, and you have nothing to do with that question unless you first find that there was a promise of marriage, and that the promise was broken. The defendant denies that there was any seduction. The plaintiff alleges that there was a seduction. And before you can make any use of that matter of seduction in determining the case, you must find the fact that there was a seduction substantially as alleged. And then, if you find from the whole matter—the whole case—that the promise of marriage was made, and justification for breaking off the promise has not been proven, and that there was seduction, then you must consider the seduction as well as the allegations of justification for refusing to carry out the promise of marriage, in assessing the damages." To all that portion of this instruction relating to seduction, and directing the jury to consider the same as an element of damages, the defendant excepted, and now assigns the same as error. Several objections are made to this instruction, and of these in their order.

First. It is contended that there is no sufficient allegation in the complaint of seduction under a promise of marriage; but in this contention we are unable to agree with counsel. It seems to us that by a fair construction of the complaint it is averred, that the alleged seduction was under a promise of marriage.

¹ For discussion of principles, see Hale on Damages (2d Ed.) § 166.

² Part of the opinion is omitted and the statement of facts is rewritten.

It is next contended that seduction cannot be alleged and proved as an element of damages in an action for a breach of a promise of marriage. Upon this question there is some slight conflict in the books, but the decided current of authority, both in this country and England, is that, while damages for seduction, as a distinct ground of action, cannot be added to the damages which plaintiff is entitled to recover for a breach of the promise to marry, it may, if alleged, be shown in aggravation of damages, on the ground that compensation for the injury she has received by the breach of the contract cannot be justly estimated without taking into consideration the increased humiliation and distress to which she has been exposed by the defendant's conduct. The action is nominally for a breach of contract, but the damages are awarded upon principles more commonly applicable to actions of tort; and, if seduction is brought about by a reliance upon the contract, it may in no very indirect way be said to be a breach of its implied conditions. "Such an engagement," says Mr. Justice Campbell, "brings the parties necessarily into very intimate and confidential relations, and the advantage taken of those relations by the seducer is as plain a breach of trust in all its essential features as any advantage gained by a trustee or guardian or confidential adviser, who cheats a confiding ward or beneficiary or client into a losing bargain. It only differs from ordinary breaches of trust in being more heinous. A subsequent refusal to marry the person whose confidence has been thus deceived cannot fail to be aggravated in fact by the seduction. The contract is twice broken. The result of an ordinary breach of promise is the loss of the alliance, and the mortification and pain consequent on the rejection. But in case of seduction there is added to this a loss of character and social position, and not only deeper shame and sorrow, but a darkened future. All of these spring directly and naturally from the broken obligation. The contract involves protection and respect, as well as affection, and is violated by the seduction as it is by the refusal to marry. A subsequent marriage condones the first wrong, but a refusal to marry makes the seduction a very grievous element of injury, that cannot be lost sight of in any view of justice." *Sheahan v. Barry*, 27 Mich. 219. The common-law practice is substantially uniform in admitting such evidence, and is, we think, based upon sound principles. 3 Suth. Dam. 316; Cooley, Torts, 510; 1 Bish. Mar. & Div. § 232; *Hattin v. Chapman*, 46 Conn. 607; *Sauer v. Schulenberg*, 33 Md. 288, 3 Am. Rep. 174; *Kniffen v. McConnell*, 30 N. Y. 285; *Sherman v. Rawson*, 102 Mass. 395; *Kelley v. Riley*, 106 Mass. 339, 8 Am. Rep. 336; note to *Weaver v. Bachert*, 44 Am. Dec. 178; *Berry v. Da Costa*, L. R. 1 C. P. 331; *Millington v. Loring*, 6 Q. B. Div. 190.

But it is claimed that, our statute (section 36) having given a woman over 21 years of age a right of action for her own seduc-

tion, the reason of the old rule has ceased, and it ought not to prevail in this state; and this would seem to be the opinion of Mr. Parsons, for he says: "By the strict rules of the law they [damages for seduction] should, we think, be excluded where the plaintiff was in actual or constructive service, or lived in a state in which the statute law gave her an action for seduction, and not otherwise; and the weight of authority seems to be so." But he seems to think that, while the strict rules of law would exclude the evidence as irrelevant, it would be impracticable to keep the fact of seduction from the jury without excluding other evidence to which the plaintiff would be entitled; and, when once admitted, the jury would probably regard it in estimating damages, and the courts would seldom disturb the verdict on that ground. 2 Pars. Cont. 70. No authorities are cited by Mr. Parsons in support of his view, and we believe none can be found in the adjudged cases.

On the contrary, where the question has arisen in states giving the woman a right to maintain an action for her own seduction, it has uniformly been held that the rule of the common law is unchanged by the statute, and that seduction may be alleged and proved in an action for breach of a promise of marriage. Thus, in Michigan, the statute authorizes an action for seduction to be brought by any relative of full age, who may be selected by the woman; and in *Sheahan v. Barry*, supra, Mr. Justice Campbell, answering a contention similar to the one made in this case, and assuming that the damages recovered in an action brought under the statute belong to the woman, says: "There are two considerations in the way of holding the rule changed by our statute. If it gives a remedy to the woman herself, it should, on common law principles, be regarded as a cumulative remedy—so far as the seduction under promise of marriage is concerned—rather than as superseding the old one. And it is better for all parties, and more consonant with public policy, that, where justice can be fully accomplished in one suit, no one should be driven to begin more than one; and where this rule is respected there can be no danger of injustice by a second prosecution. The maxim that no one shall be twice vexed for the same cause of action will always prevent any plaintiff from suing twice for the same damages. If they can be recovered in this action under the pleadings, a recovery in this will necessarily be a bar to any future action. This subject was recently considered in the case of *Leonard v. Pope*, 27 Mich. 145." So, also, in *Haymond v. Saucer*, 84 Ind. 3, 11, it was held, under a statute like ours, that seduction could be considered as an element of damages in an action for a breach of promise, Mr. Justice Woods saying: "The fact that seduction accomplished under some circumstances is a crime is no reason why it may not be the subject of a civil action; and if, instead of making a separate cause of action, the injured party chooses to plead it as a cause for ag-

gravation of damages in a suit for a breach of the promise of marriage under which it was accomplished, there is no good reason why it may not be done."

Several of the other states contain similar statutory provisions, but we have not been able to find a single case in which it has been held that evidence of seduction in an action for breach of promise of marriage is not admissible on that ground. The rule allowing seduction to be alleged and proven in such an action is but a rule of damages based upon the theory that a plaintiff is entitled to compensation for mental suffering, injury to reputation, loss of virtue, and the shame and disgrace caused by defendant's conduct, and ought not to be varied because of the possibility of another action. And from the Michigan and Indiana cases it would seem that if a plaintiff chooses to allege and prove seduction in an action for breach of promise in aggravation of damages the judgment in such action would be a bar to a further action by the woman under the statute for her own seduction. * * *

It is also claimed that the court erred in instructing the jury that if they found from the evidence that the promise of marriage was made, and justification for breaking off the promise had not been proven, and that there was seduction, then they must consider the seduction in assessing the damages. In actions of this character the question of damages belongs exclusively to the jury, subject, of course, to the power of the court to set aside the verdict if against the evidence, or when excessive damages are allowed. There are no hard or fast rules by which the amount can be determined. Each case must be dealt with according to its own particular circumstances. While seduction under a promise of marriage may be alleged and proven in aggravation of damages, yet it is for the jury alone to determine what weight, if any, is to be given to such testimony, and what effect it will have in determining the amount of damages to which plaintiff is entitled. That portion of the instruction complained of deprived the jury, in case they found the facts referred to, of all discretion upon the question as to whether they should consider the seduction in assessing damages. They were told that in that event they must so consider it. Such we do not understand to be the law. In an ordinary action for a breach of contract the amount recovered is limited to the actual damages caused by the breach.

To this rule there is an exception in an action for breach of promise of marriage, because, although founded on contract, it is regarded as being somewhat in the nature of an action founded upon tort; but the cases sustaining the exception go no further than to hold that it should be left to the good judgment and discretion of the jury whether or not there should be added to the damages naturally resulting from a breach of the contract anything on account of seduction accomplished under the promise.

In the case of *Jacobs v. Sire*, 4 Misc. Rep. 398, 23 N. Y. Supp. 1063, in an action for a breach of promise of marriage, the court instructed the jury that if they believed from the testimony the defendant had purposely and maliciously wronged the plaintiff, they were bound to give what are called "exemplary damages;" but the court held this instruction error, upon the ground that it deprived the jury of all discretion upon the question whether exemplary damages should or should not be given. The court said: "Sedgwick and other text writers on damages agree upon the proposition that, where there is evidence of circumstances sufficient to uphold a verdict for exemplary damages, the question whether they shall be given or not is one for the jury; and it is erroneous to instruct the jury to give exemplary damages, for the plaintiff can never recover them as a matter of law."

So, in this case, we think it was error for the court to instruct the jury that if they found a promise was made, and there was no justification for the breach, and that seduction occurred, they must consider the seduction as an element in estimating the damages; and under the evidence we cannot say that it was harmless error. From plaintiff's own testimony it appears that she was not inexperienced in the ways of the world, but was of mature years, had been married, and became engaged to the defendant, who is an old man, within two weeks after her first acquaintance with him; that she left the home of her aunt and uncle, where she was living, and went to defendant's rooms, where she claims to have been seduced, and lived with him as his "promised wife" for some time before the alleged seduction took place, and continued to live with him afterwards without complaint; and that the alleged seduction was not disclosed to any person, or known by any one except the parties, until the plaintiff consulted counsel for the purpose of bringing this action.

Under these circumstances it was prejudicial error to tell the jury that if they found the seduction they must consider it in estimating the damages. It should have been left to the sound judgment and discretion of the jury, under all the circumstances of the case, with the direction that they should exercise their own judgment, and consider the seduction or not, as to them might seem just and proper. * * * Judgment reversed.

II. Exemplary Damages ³

CHELLIS v. CHAPMAN.

(Court of Appeals of New York, 1891. 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784.)

GRAY, J.⁴ This plaintiff has recovered a verdict for \$8,000, as damages for the breach by defendant of his promise to marry her. The proofs abundantly justified the jury in finding as they did, but the defendant insists that the trial judge erred in his rulings upon the evidence, and in his charge. He does not raise any question about the fact of his agreement to marry the plaintiff * * * but he thinks his case was prejudiced by the admission of certain evidence, and by the way in which the trial judge submitted the question of the damages to the consideration of the jury, and that he should, therefore, have a new trial. * * * Evidence of the defendant's general reputation as to wealth, at the time of the agreement of marriage, was admitted against the objection to its competency upon the subject of damages in such an action. The exception to its admission presents an interesting question, and one which may be deemed not altogether free from difficulty. Such evidence, on first consideration, seems to conflict with the general rule that in actions for a breach of contract evidence as to the defendant's wealth is inadmissible. The plaintiff, in such actions, is entitled to recover only those damages which she may prove that she has suffered in consequence of the defendant's failure to perform on his part. The defendant's solvency, or insolvency, has nothing to do with the issue, and furnishes no measure for the computation of damages. And this rule of exclusion as to such evidence has been also applied to cases where damages are sought to be recovered for seduction, or for criminal conversation. *James v. Biddington*, 6 Car. & P. 589; *Dain v. Wycoff*, 7 N. Y. 191. * * *

The principle underlying the exclusion of this kind of evidence, in the latter class of cases, is that vindictive or punitive damages would be improper, as the recovery in them should be confined to what the jury may deem to be a sufficient compensation for the injury sustained by the plaintiff. But the present action is quite other in its nature, and constitutes an exception to that general rule upon the subject of damages for violation of contract obligations which has been assented to by the judges of the courts in this country and in England. It is apparent that, in such an action as this, there can be no hard and fast rule of damages, and

³ For discussion of principles, see *Hale on Damages* (2d Ed.) § 167.

⁴ Part of the opinion is omitted.

that they must be left to the discretion of the jury. Of course, that discretion is not so absolute as to be independent of a consideration of the evidence. It is one which is to be exercised with regard to all the circumstances of the particular case, and, as it has frequently been said, where the verdict has not been influenced by prejudice, passion, or corruption, the verdict will not be disturbed by the court. That the amount of the suitor's pecuniary means is a factor of some importance in the case of a demand of marriage cannot fairly be denied. It is a circumstance which very frequently must have its particular influence upon the mind of the woman in determining the question of consent or of refusal; and, as I think, in a proper case, very naturally and properly so. The ability of the man to support her in comfort, and the station in life which marriage with him holds forth, are matters which may be weighed in connection with an agreement to marry.

In the case at bar the plaintiff was 47 years of age, and the defendant 74. Six years previously he had sought her acquaintance, unsolicited by her, and with matrimonial views on his part. He had visited her more or less frequently, and had twice proposed marriage before their engagement in 1886. She was and had been supporting herself as a teacher and superintendent in city schools. He had never been married, and had lived in the country as a farmer. He was possessed of pecuniary means, considerable in amount in the general estimation of his neighbors, and not inconsiderable if we take his own estimate. Though pretending to some cultivation of mind, which, among other ways, if we may judge from this record, he seemed to delight in displaying by a versification of the homely though not very inspiring or romantic topics and events of his farm life and surroundings, he yet was seemingly lacking in those outward graces of the person which are not infrequently deemed a substitute for more solid possessions. Nor does he seem to have had recourse to the adventitious aids of the wardrobe to adorn his exterior person, and thereby to compensate for personal shortcomings. I think that the jury should be made aware of all the circumstances which in this case, and in every such case, might be supposed to have presented themselves to the mind of the plaintiff when asked to change her position by marriage. Of these circumstances, the home offered, which for its comforts and ease would depend upon the more or less ample pecuniary means of the defendant, the freedom from the personal exertions for daily support, the social position accompanying the marriage, all these are facts which have their proper bearing upon the question of marriage. The wealth and the reputation for wealth of a man are matters which, as this world is constituted, often aid in determining his social position, notwithstanding he may have other and more intelligible rights to it, and despite objectionable characteristics or traits. Where, therefore, the defend-

ant has demanded an engagement of marriage, it seems proper enough that the jury should know what possible reinforcement his suit may have had, and what were the inducements offered by his social standing and surroundings. * * *

I apprehend, however, that the difficulty, in the question before us, of the evidence, is not so much in adducing proof as to defendant's pecuniary means, as in the mode of their proof. But assuming, as I think we are bound to do under the authorities, that the amount of defendant's property is material in such an action, then evidence of the reputation which he enjoys for wealth is unobjectionable. Reputation is the common knowledge of the community, and, if it is exaggerated or incorrect, the defendant has the opportunity to correct it, and of giving the exact facts upon the trial. The admission of the evidence is not to establish an ability to pay, but to show the social standing which defendant's means did, or might, command. In *Kniffen v. McConnell*, 30 N. Y. 289, which was an action for a breach of promise of marriage, Judge Ingraham, delivering the opinion of the court, held that "it may be objectionable to particularize the defendant's property, and such evidence should be confined to general reputation as to the circumstances of the defendant. To that extent I think it admissible." The learned judge does not reason upon the rule, but I am not aware that this decision has ever been questioned, and I do not think it well can be. In *Kerfoot v. Marsden*, 2 Fost. & F. 160, an action for breach of promise of marriage, in 1860, Wilde, B., ruled: "You may ask in a general way as to the defendant's property, but you cannot go into particular items as to his property." I think we must conclude upon authority, as well as upon the reason of the thing, that evidence of the reputation of the defendant as to wealth is admissible in these cases. The belief of the plaintiff must have been influenced by the opinions or beliefs of the members of the community in which the defendant resided. She could not be presumed to have personal cognizance of a matter, which is so peculiarly one within the individual's exclusive knowledge, and what credence she gave to general report was not without justification. She had some right to rely upon it. The action is intended as an indemnity for the temporal loss which the plaintiff has sustained, and that embraces the mortification to the feelings, the wounded pride, and all the disappointments from the failure of the marriage, as well in the losses it has occasioned as in the blow to the affections.

The appellant insists upon the error of the trial judge in submitting to the jury the question of exemplary damages. But we think, in such a case, that it is the province of the jury to determine upon the proof of the facts and of the surrounding circumstances what damages should be awarded. If the conduct of the defendant in violating his promise is characterized by a disregard

of the plaintiff's feelings or reputation; if he has placed her or induced her to place herself, in a false position, or to forego temporal advantages; if the breach of his promise is unjustifiable; if he spreads upon the records matters in defense of the action which are scandalous, and tend to reflect discredit upon the plaintiff, or to stain her reputation—then these are all circumstances which may be considered by the jury, and may be availed of by them to enhance the damages. Here the trial judge did not say in his charge that this was a case for the infliction of punitive damages. He instructed the jury, in substance, that if the plaintiff was entitled to damages they should certainly give compensatory damages, and that, in the exercise of a discretion based on the proofs and circumstances of the case, they might award exemplary or punitive damages. Upon this subject, of when such damages might be awarded, he read at length from the opinions of this court in *Thorn v. Knapp*, 42 N. Y. 474, 1 Am. Rep. 561, and *Johnson v. Jenkins*, 24 N. Y. 252, for the purpose of showing the rule to be applied. It is clear that he left it to them to arrive at a decision upon the propriety of giving exemplary damages from a consideration of the defendant's motives and conduct. Now, there was evidence in the case upon which a verdict might well include exemplary damages. The wedding day was agreed upon, the usual preparations were made by the plaintiff, and relatives and guests were bidden to the ceremony. But the defendant did not appear. He alleged physical ailments in excuse of not fulfilling his marital engagement, but there was evidence that he was evading it, and shamming illness. He admits that he had no fault to find with her. She had resigned her position to marry him. He denies requesting her to do so; but his attempt at denial is weakened by his subsequent admission that he expected her to do it. Then, in his pleading, he charges the plaintiff with having no affection for him, but with entertaining a purpose to procure money from him, on the pretense of his promise to marry her, and his breach thereof. These were elements in the case which might properly enter into the decision of the jury as to the amount of damages. * * * Judgment affirmed.



57 6020 90
62 " 492
65 "



